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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1009

WESTERN NATURAL GAS COMPANY, *Petitioner,*

v.

CITIES SERVICE GAS COMPANY, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

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CITIES SERVICE GAS COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

Petitioner, Western Natural Gas Company, prays that a writ of certiorari issue to review the decision and judgment of the Supreme Court of the State of Delaware entered in its Case No. 20, 1966 (and see reference below to prior decisions in the same case).

OPINIONS BELOW

The original opinion of the Superior Court of the State of Delaware In and For New Castle County granting summary judgment to Respondent was rendered May 20, 1960, is unreported, and appears as Appendix B hereto, *infra*, pp. 5a-12a. The opinion of the Supreme Court of Delaware remanding the case for trial on state issues was dated May 21, 1964, is reported at 201 A. 2d 164, and is printed as Appendix C hereto, *infra*, pp. 14a-25a. The subsequent opinion of the Superior Court again granting summary judgment to Respondent was issued December 10, 1965, is unreported, and appears as Appendix D hereto, *infra*, pp. 28a-35a. The opinion of the Delaware Supreme Court affirming

the Superior Court judgment was dated October 12, 1966, is as yet unreported, and is set forth in Appendix E hereto, *infra,* pp. 36a-44a.

JURISDICTION

The opinion of the Supreme Court of Delaware was rendered on October 12, 1966. Petitioner filed a timely Petition for Re-Argument, which was denied on November 1, 1966. The mandate of the Court was issued the same day. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

The issues of Federal Power Commission jurisdiction and Petitioner's rights and immunities under the Natural Gas Act were raised in Petitioner's answer (A-10), its counterclaim (A-15), its cross motion for summary judgment (A-247, A-248), and its original appeal to the Supreme Court of Delaware.[1] The Delaware Supreme Court specifically passed upon these issues. App. C, *infra,* pp. 14a-25a. Petitioner raised the federal issues before this Court in its Petition for a Writ of Certiorari in 1964. However, Respondent argued as its very first point in its Brief in Opposition that the Delaware decision was not final, since the case had been remanded for trial, and this Court denied certiorari. 379 U.S. 905 (1964). Thereafter, Petitioner preserved its federal questions through the second appeal to the Delaware Supreme Court,[2] although that Court, having previously decided these issues, found it unnecessary to pass upon them again. The finality issue thus has now

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[1] Citations are to "Appellant's Appendix" used in the first appeal to the Supreme Court of Delaware, a certified copy of which is filed with the record in this case.

[2] Appellant's Brief before the Supreme Court of Delaware, p. 42 (1966): "The position taken in the prior appeal in this case that the effective filed rate under the Natural Gas Act was 11¢ and that in no case could a contractual rate, differing therefrom, be enforced without prior filing with the Federal Power Commission is here reiterated."

been resolved by the trial court's final judgment and affirmance by the Delaware Supreme Court, so that the federal questions are now ripe for review.[3]

STATUTES INVOLVED

This case involves §§ 4(c), 4(d), 5(a), 7(c), and 7(e) of the Natural Gas Act, 52 Stat. 822, 823, 825 (1938), 56 Stat. 84 (1942), 15 U.S.C. §§ 717c, 717d, 717f(c), and 717f(e). All are set out in Appendix A, *infra*, pp. 1a-4a.

QUESTION PRESENTED

Beginning in 1955 — three years prior to the commencement of any state court action relative to the rates of Western Natural Gas Company involved in this case — the Federal Power Commission began taking a number of specific steps in the exercise of its jurisdiction over these rates under the Natural Gas Act:

(a) The Commission in 1955 accepted for filing under Section 4 of the Act a Western rate schedule specifying the rate of 11 cents per Mcf which was being paid in 1954 to Western by Cities Service Gas Company;

(b) The Commission in 1955 issued to Western a Certificate of Public Convenience and Necessity under Section 7 of the Act after issuing a public notice of hearing thereon stating that the proposed price was 11 cents per Mcf;

(c) The Commission instituted, and in 1960 dismissed, an investigation of Western's rates under Section 5(a) of the Act, using as a basis for dismissal comparisons of Western's revenues and costs reflecting the 11 cents filed rate;

(d) Still prior to any state court action instituted by Cities, the Commission docketed, and still has pending, a

[3] The trial Court stayed execution of the judgment pending disposition of this Petition for a Writ of Certiorari.

complaint filed by Western invoking the Commission's primary jurisdiction and seeking determination of the effective rate after Cities ceased paying the 11 cents rate in 1958 because of Cities' claim that an 8 cents "contract" price applied;

(e) The Commission's staff, as recently as November 8, 1966, has continued to use the 11 cents rate in exhibits in the applicable "area rate" case now in hearing before the Commission.

Despite the above, the Delaware Supreme Court has held in a collateral action to which the Commission was not a party that the Commission does not have primary jurisdiction over the rate controversy between Cities and Western, that an 8 cents "contract" price controls, and that on the basis of state law, Cities is entitled to recover alleged overpayments pursuant to an agreement, not filed with the Commission, for refund of amounts paid at the 11 cents level. The question presented is:

In light of the above facts, (a) whether the Commission, rather than a state court in a collateral action, has primary jurisdiction over a dispute as to the effective rate level under the Natural Gas Act, and (b) whether the Commission established the 11 cents rate as the effective rate and, if so, whether existence of such rate precludes enforcement in a collateral court action of a contract price or unfiled refund agreement differing therefrom.

STATEMENT

1. Initial Actions of the Federal Power Commission.

On November 16, 1954, pursuant to Commission orders following *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672 (1954), Petitioner, a producer of natural gas, tendered to the Commission (a) its rate schedule covering its sale to Cities Service Gas Company (Cities) from the Hugoton Field, Kansas, being made on the date of the *Phillips* decision (A-100), and (b) its application for a Certificate of Public Convenience and Necessity authorizing continuation of that sale (A-31). The rate schedule included a contract between Petitioner and Cities originally providing a price of 8 cents per thousand cubic feet (Mcf) (A-39), a supplement which did not affect price (A-72), a "minimum price order" of the Kansas Corporation Commission effective since January 1, 1954, requiring a price of 11 cents per Mcf (A-78), and a copy of a billing statement showing that the price being collected at the time of filing was 11 cents per Mcf (A-88).

On January 13, 1955, the Commission formally considered this rate filing as identified on a table setting forth the 11 cents rate (A-196); voted to accept the rate for filing under Section 4 of the Act; and entered this action in its minutes (A-194). Notice of this Commission action was mailed to Petitioner on March 8, 1955 (A-90-92), and a copy thereof was mailed to Cities by Petitioner (A-134).

On August 10, 1955, the Commission caused to be published in the Federal Register a notice of hearing on Petitioner's application for a Certificate under Section 7, announced a hearing on September 7, 1955, and declared: "The price for the gas is stated to be 11¢ per Mcf." (20 Fed. Reg. 5794)

The Notice advised that protests or petitions to intervene might be filed on or before August 25, 1955. None was filed by Cities or by any other person. On September 14, 1955, the Commission issued to Petitioner an unconditioned Certificate under Section 7 of the Act to continue its sale as described in Petitioner's application (A-31).

Cities filed no protest to these actions and sought no appeal therefrom under Section 19(b) of the Act, although Cities had notice of Petitioner's filings through the Federal Register and because of service by Petitioner (A-191-192). Cities also continued to pay the 11 cents rate after these Commission actions.

2. The Section 5(a) Investigation.

On January 26, 1956, the Commission instituted an investigation under Section 5(a) of the Act of all of Petitioner's rates subject to Commission jurisdiction, including the rate for sale to Cities (A-106). Notice of this proceeding was issued, and some 60 interested parties intervened. Cities, however, did not.

After lengthy hearings and upon the record, the Commission, on January 20, 1960, entered its order terminating the Section 5(a) investigation, leaving Petitioner's rates in effect.[4] The termination rested upon the conclusion that Petitioner's revenues were not "unreasonable" or "excessive" when compared to its cost of service.

In turn, this conclusion rested upon the record, including a Commission Staff Exhibit covering "Interstate Rate Schedules Effective During Test Year" which showed, for the sale here involved, the filed rate of 11 cents (11.0011 cents) per Mcf as the effective rate.

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[4] The Commission's order is reported as Western Natural Gas Co., 23 FPC 235 (1960). The Examiner's Decision is reported at 23 FPC 238 (1959).

While the Commission stated that its action was not to be construed as a "determination" as to what Petitioner's "effective legal rates are or have been," the result was to leave unchanged the rates then in effect under Section 4.

3. The Complaint Before the Commission.

Following the rate filing and the issuance of Petitioner's Certificate, payments were made by Cities at the 11 cents rate until the January 20, 1958, decision of this Court declaring the Kansas minimum price order invalid.[5] Neither Petitioner nor the Commission was a party to the suit resulting in that decision, which did not involve the status of the 11 cents rate then on file under the Act. However, on January 29, 1958, Cities notified Petitioner that it was resuming payment at 8 cents per Mcf (A-150). Cities had not sought and did not then or thereafter seek any action by the Commission that would result in placing 8 cents in effect as a rate, or changing the 11 cents rate recognized by the Commission's acceptance for filing of Petitioner's rate schedule and the issuance of Petitioner's Certificate.[6]

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[5] *Cities Service Gas Co.* v. *State Corporation Commission*, 355 U.S. 391 (1958).

[6] Then, as now, the Commission's Regulations under the Natural Gas Act prohibit a change of effective rate level without Commission action under Section 4:

"154.94 Changes in Rate Schedules

"(a) No change shall be made in any rate, charge or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to Section 154.92 hereof, without first filing a change in rates pursuant to Section 4(d) of the Natural Gas Act in accordance with this section.

"(b) Every (such) change * * * shall be filed with the Commission * * * not less than 30 days nor more than 90 days prior to the date such change in rate schedule is proposed to be made effective."

On April 23, 1958, because of Cities' unilateral act, Petitioner filed a complaint with the Commission under Sections 1.6(b) and 1.7(c) of its Rules of Practice and Procedure, alleging that Cities' action was a violation of the Act and seeking action by the Commission, including a determination of the dispute over the rate Cities was legally obligated to pay (A-124).

The Commission docketed the complaint and cited Cities to appear and answer. Cities did so on June 19, 1958 (A-142-149). The Commission thereafter did not proceed to dispose of the complaint, *but continues to retain it on its docket without decision to date.* The Commission continued to recognize Petitioner's 11 cents rate in its subsequent Section 5(a) investigation, *supra,* and as recently as November 8, 1966, the Commission's staff has listed the 11 cents rate as "effective" in exhibits to be used in the Commission decision of the pending "Hugoton-Anadarko Area Rate" proceeding applicable to sales in Kansas.[7]

4. The State Court Suit.

On June 16, 1958, while the Petitioner's complaint and the Commission's Section 5(a) proceeding were pending before the Commission, Cities filed suit against Petitioner in a Superior Court of the State of Delaware seeking recovery of payments made in excess of an 8 cents price from January 1, 1954, through December 22, 1957 (A-4). Cities' complaint asserted a claimed contract price, excess payments allegedly made pursuant to the state order, invalidity of that order, and a right of recovery on the grounds that payments had been made involuntarily and/or that a "contract" for refund existed. The complaint carefully omitted all reference to Commission actions since

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[7] This recognition appears in Commission Docket No. AR64-1, *et al.*, Exhibit Nos. 81-1(A), p. 376, line 43, and 81-1, p. 317.

1954 and made no mention of any possible rights under the Natural Gas Act or pendency before the Commission of Western's complaint involving the same controversy.

Petitioner answered (A-10), urging that jurisdiction over the controversy lay in the Commission because of the Commission's actions, the pending complaint and Section 5(a) proceedings, and the operation of the Natural Gas Act. Petitioner also urged in bar to the asserted claim of overpayment that the filings with, and actions by, the Commission established the legal, effective rate of 11 cents per Mcf under the Act, and that such rate remained effective and binding on the parties. In addition, Petitioner filed a counterclaim seeking recovery of amounts due subsequent to December 22, 1957, at the 11 cents filed rate (A-15).

Both Petitioner and Cities filed motions for summary judgment. On May 24, 1960, the trial court filed its Memorandum of Decision granting Cities' motion for summary judgment and denying Petitioner's motion (App. B, *infra*, pp. 5a-12a).

Each of the federal questions raised by Petitioner was briefed and argued before the trial court (A-255, A-324), which held that the effective rate remained the "contract rate," that the state court had jurisdiction to hear and decide the case, and that under the facts, Cities was entitled to restitution of amounts paid in excess of an 8 cent contract price.

Petitioner appealed to the Supreme Court of the State of Delaware, where each of the federal questions was presented, briefed, and argued, both in original briefs and in Petitions for Re-argument. On May 21, 1964, the Supreme Court of Delaware, after reargument, filed its opinion holding (a) that the various actions by and before the Commission did not preclude hearing, decision, and judgment in the state court; (b) that despite the Commission's actions

under Sections 4, 5(a) and 7 of the Act, the contract price remained "effective" so that Cities had made overpayments; and (c) that issues of fact existed with respect to Cities' right to recover on the theory of restitution. So holding, the Court set aside the trial court's judgment and remanded the case for further proceedings (App. C, *infra*, pp. 14a-25a).

A hearing was then held on the state law questions, and summary judgment was again granted to Cities. The Delaware Supreme Court affirmed on the ground that there was a "contract" for refund and awarded judgment thereon even though no such contract was ever filed with the Federal Power Commission. (App. E, *infra*, pp. 36a-44a). Petitioner specifically preserved its federal questions during its second appeal (*supra*, n. 2), although the Delaware Supreme Court found it unnecessary to pass upon them again. These federal questions are now ripe for review.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with the construction of other federal statutes as to the binding effect of filed rates in collateral actions[8] and of primary agency jurisdiction, but the basic questions presented here involving the Natural Gas Act have not been passed upon by this Court.

1. The Decision Conflicts with Federal Power Commission Primary Jurisdiction and the Requirement of Exhaustion of Administrative Remedies.

Regulated companies cannot follow the dictates of two authorities as to past, present or future rates. One forum

[8] See *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951) (Federal Power Act); *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) (Interstate Commerce Act), and see n. 15 *infra*.

must yield to the other. Yet under the erroneous holdings below, the state courts are free to proceed as though the Federal Power Commission is without primary jurisdiction and Commission action under the Natural Gas Act is of no legal effect.

The decision below is in direct conflict with the principle of primary agency jurisdiction long established by this Court as applicable in other areas of rate regulation. See *Far East Conference* v. *United States*, 342 U.S. 570 (1952), and *United States* v. *Western Pacific RR Co.*, 352 U.S. 59 (1956).[9] The decision is also in conflict with recent decisions by the Fifth Circuit that where it is even "arguable" that disputed rates are subject to Commission jurisdiction,

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[9] That the primary jurisdiction doctrine is peculiarly applicable where, as here, a court and an administrative body may otherwise render conflicting decisions on matters within the administrative body's jurisdiction was re-emphasized recently in *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966). In discussing its earlier decisions in *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474 (1932), and *Far East Conference* v. *United States* 342 U.S. 570 (1952), the Court said: "There was a real risk that the District Court might find that the defendants had implemented unapproved agreements while the Commission might find in some later proceedings that the same activities constituted the implementation of approved agreements. This Court decided that the danger of such a conflict could best be avoided by holding that one tribunal or the other has the exclusive right to make the initial factual determination." 383 U.S. at 220.

In *Carnation* the plaintiff attacked certain rate making agreements as *per se* violations of the anti-trust laws, claiming such agreements had not been approved by the Federal Maritime Commission. The defendants countered that the rate making was pursuant to an earlier agreement which had been approved by the Commission. The Court clearly recognized that a primary determination of whether the rates challenged were, in fact, within the approved orders of the Commission must be made by the Commission and that the lower court should have stayed the case pending outcome of the Commission proceedings. See also *Incress S.S. Co.* v. *Maritime Workers Union*, 372 U.S. 24 (1963); *Whitney National Bank* v. *Bank of New Orleans*, 379 U.S. 411 (1965).

a trial court must hold its proceedings in abeyance pending recourse to the Commission, through its complaint procedures, for decision upon its jurisdiction and the effect of Commission actions upon the merits of the rate controversy. *J. M. Huber Corp.* v. *Denman*, 367 F. 2d 104 (5th Cir. 1966), and *Weymouth* v. *Colorado Interstate Gas Co.*, 367 F. 2d 84 (5th Cir. 1966).

The decision below thus adds to developing confusion in lower federal and state courts as to just which rate controversies are subject to primary Commission jurisdiction and which are within the ambit of federal and state court jurisdiction. On the one hand, the Fifth Circuit has recently followed the principle of *Far East;* on the other, the Delaware courts and others have proceeded to judgment applying state law to resolve disputes over regulated rates.[10] The same question of Commission primary jurisdiction is pending today in numerous state court proceedings involving disputes between regulated producers and royalty owners;[11] has arisen since 1954 in other contexts involving producers'

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[10] Compare the Fifth Circuit opinions above and *Landon* v. *Northern Natural Gas Co.*, 338 F. 2d 17 (10th Cir. 1964), *cert. denied*, 381 U.S. 914 (1965), and *Pan American Petroleum Corp.* v. *Kansas-Nebraska Natural Gas Co.*, 297 F. 2d 561 (8th Cir. 1962), *cert. denied*, 370 U.S. 937 (1962). In *Landon*, the issue of primary jurisdiction, although discussed in the body of the petition, was not raised as one of the questions presented to this Court. In *Pan-American*, the primary jurisdiction doctrine was not even discussed in the petition.

[11] According to a complaint filed at the Commission by Mobil Oil Corporation, there are 284 such suits pending against that company in Kansas alone (FPC Docket No. RI67-114). Petitioner itself is a defendant in a similar action. This is *Hennigh* v. *Western Natural Gas Co.*, No. 2523, District Court, Grant County, Kansas, a class action brought on behalf of a large number of royalty owners.

regulated rates;[12] is subject today to two emergent, conflicting lines of decisions, including that below; and should now be finally resolved by this Court.

In this instance, the controversy between two regulated companies involved a state pricing order and the question of enforceability of an alleged, but unfiled, refund contract, but the question of Commission jurisdiction arises whether the original cause of controversy is a state tax statute, pricing order, or clause in a private contract. By complaint or answer, the legal effect of Commission acts upon rates is drawn into question in these cases, and ultimately the question of primary agency jurisdiction is unavoidable. If the Fifth Circuit is correct that the agency has primary jurisdiction even over "arguable" questions, then this Court should make clear that the same is true where, as here, both parties and the rate in question are regulated, there are numerous past Commission acts relevant to the merits of the controversy, and the dispute has been submitted to the Commission by proper complaint under Commission Rules.

The holding below treats such Commission complaint procedures as irrelevant, and the court thereby disregards applicability of the doctrine of primary agency jurisdiction.

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[12] See, *e.g.*, *Superior Oil Co.* v. *El Paso Natural Gas Co.*, 377 S.W. 2d 691 (Tex. Civ. App. 1964); *Deep South Oil Co. of Texas* v. *Texas Gas Corp.*, 358 S.W. 2d 641 (Tex. Civ. App. 1962); *Northern Natural Gas Co.* v. *State Corporation Commission of Kansas*, 372 U.S. 84 (1963); *Van Lewis* v. *Transcontinental Gas Pipe Line Corp.*, 200 F. Supp. 219 (S.D. Tex. 1961), and *Pan American Petroleum Corp.* v. *El Paso Natural Gas Co.*, No. 7925 Sup. Ct. of N. Mex. (decided December 27, 1966). In the latter case, the New Mexico Supreme Court has held that a state court has jurisdiction in a rate controversy to decide a threshold question involving interpretation of state tax statutes and contracts, but because of the Commission's exclusive jurisdiction under Section 4 over rate changes, the state court cannot enter a "coercive decree to carry" its own "declaratory judgment into effect."

Throughout this case, Petitioner's complaint raising the same issues has been pending before the Commission. The Delaware court, however, misconstrues Commission inaction to date as a "disclaimer" and apparently assumes that even if it so desired, the Commission lawfully could "delegate" its primary jurisdiction over rates and this controversy to state courts. The opposite is true. See *J. M. Huber Corp.* v. *Denman, supra,* 367 F. 2d at 119, where the court said:

> "But Lessee Pipeline (and the FPC memorandum brief) counter with a good deal of force that this nonaction proves little — certainly not in the light of Phillips I which put an end to 26 years of administrative inaction."

Moreover, that there has been no true "disclaimer" is reflected by the Commission order issued February 7, 1962, terminating a "rule-making" proceeding originally instituted to resolve disputes over Kansas rates resulting from Commission acceptance for filing of rates based on the Kansas order (27 FPC 326). There, the Commission said:

> "We believe at this late date a rule-making proceeding would be a cumbersome and inappropriate means by which to *exercise our jurisdiction* over the matters involved herein. *Such matters can more conveniently be decided when properly raised in individual proceedings before us* * * *." [27 FPC 327, emphasis added.]

This statement is an unequivocal recognition of jurisdiction, and a reference to "individual" proceedings before the Commission, such as Petitioner's complaint proceeding, as a proper proceeding for decision of the controversy. The Commission's duty in such complaint proceedings is well established. After the filing of a complaint under the procedures invoked by Petitioner, the Commission exercises its jurisdiction and decides the controversy over the effective rate. See, *e.g., Trunkline Gas Co.* v. *Superior Oil Co.,* 31 FPC 506 (1964).

To our knowledge, no other case has heretofore dealt specifically with the question of jurisdiction over a collateral determination of rate questions *already* pending before the Commission in a complaint proceeding.

Western's position is and has been throughout this protracted litigation that the Commission, and only the Commission, can determine the disputed question as to the effective rate under the Natural Gas Act. Thus, if a state court has jurisdiction at all in a proceeding of this nature, it may exercise that jurisdiction only after the Commission has first determined the disputed question as to the effective rate and established when that rate became effective. As Western told the Delaware Supreme Court in 1963, "* * * the only proper course for this Court to pursue is to dismiss this case or, at the very least, to stay its hand until a decision in G-14958 has been reached by the Commission."[13] Western reiterated the same position in 1966: "We also urge the Court to reconsider its conclusions as to primary jurisdiction * * * and to reverse and remand this case with instructions to the Superior Court to stay further proceedings pending decision by the FPC upon a pending Complaint filed with the FPC by Western."[14]

This case, however, has followed a course which the doctrines of primary jurisdiction and exhaustion of administrative remedies were evolved to prevent. See *Far East Conference* v. *United States*, and *Carnation Co.* v. *Pacific Westbound Conference, supra.* If the Delaware court is correct, the selected forum for the adjudication of rate

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[13] Petition for Re-Argument, No. 58, p. 18 (1962). See also Appellant's Brief before the Supreme Court of Delaware, p. 37 (1962): "The FPC having thus the power and duty to act, and its jurisdiction having attached first over issues peculiarly within its competence involving the public interest, Western submits that the court below erred in failing to stay its hand until the FPC has acted upon Western's pending Complaint."

[14] Petition for Re-Argument, No. 20, pp. 23-24 (1966).

disputes is to be that which, in the plaintiff's view, is most likely to look favorably upon its contentions. Pendency of the same controversy before the Commission has no bearing. And prior Commission acts controlling rates may be deemed irrelevant to enforcement of a contract price and an unfiled rebate agreement as determined by the court. Clearly, this construction by the Delaware courts and other lower courts conflicts with decisions of this Court as to primary agency jurisdiction and with decisions of such lower courts as are applying the principle of *Far East* and similar cases.

2. The Decision Conflicts With The "Filed Rate" Doctrine Applied Under the Natural Gas Act by lower Federal Courts and the Commission and Sanctions Enforcement of Unfiled Rebate Agreements.

Regardless of the jurisdiction of a state court to entertain a complaint, when the court proceeds to adjudicate an "effective" rate and enforce its conclusion, that court is assuming jurisdiction over the rate for all periods involved in the controversy before it. When the court does so collaterally by treating prior Commission action as of no legal effect, that court also is exercising a rate control which is exclusively the Commission's.

This case brings before this Court the substantive issues of the "filed rate" question left unresolved in *Pan American Petroleum Corp.* v. *Superior Court of the State of Delaware*, 366 U.S. 656 (1961), wherein this Court stated that it was "not called upon to decide the extent to which the Natural Gas Act reinforces or abrogates the private contract rights here in controversy."

Established principles under the Act have been that effective rates may not be changed retroactively (*Federal*

Power Commission v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944)), and, under some lower federal court and Commission decisions, that the "filed rate" doctrine is applicable, *i.e.*, the specific rate filed with the Commission becomes and remains the *only* legal, binding rate in collateral proceedings until changed by Commission action under Sections 4 or 5.[15]

Adherence to these principles provides stability in rates not possible under the doctrine of the Delaware court's decision. Under that decision, state or federal courts, on determination that a contract price is different from the rate on file with the Commission, may enforce that contract price without any prior filing with or action by the Commission to change the rate so filed. Unfiled refund or rebate agreements calling for repayment of amounts paid pursuant to filed rates thus become enforceable under such decision.

The course followed by Cities here and sanctioned by the Delaware court's decree would by-pass and render meaningless and unnecessary the procedures provided by the Act for court review of Commission action in accepting rates for filing or in granting Certificates permitting service at any given rate.

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[15] See *McClellan* v. *Montana-Dakota Utilities Co.*, 204 F. 2d 166 (8th Cir. 1953); *Cities Service Gas Co.* v. *Federal Power Commission*, 255 F. 2d 860 (10th Cir. 1958), cert. denied sub nom. *Magnolia Petroleum Co.* v. *United States*, 358 U.S. 837 (1958); and *Signal Oil & Gas Co.* v. *Federal Power Commission*, 238 F. 2d 771, 773 (3d Cir. 1956), cert. denied, 353 U.S. 923 (1957), applying the principle set out in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, *supra*. An apparent conflict as to the applicability of the "filed rate" principle under the Natural Gas Act is reflected by collateral decisions in *Pan American Petroleum Corp.* v. *Kansas-Nebraska Natural Gas Co.*, *supra*, relied upon below, and *Landon* v. *Northern Natural Gas Co.*, *supra*. However, the Commission still applies the "filed rate" principle in proceedings before it. See *e.g.*, *Trunkline Gas Co.* v. *Superior Oil Co.*, *supra*.

Section 19(b) of the Act provides the method for review of Commission action in accepting a rate for filing. Under the Commission procedures regarding Certificate applications the proposed rate may be conditioned where appropriate protest is filed. And Commission action in this regard is reviewable under Section 19(b). Cities invoked these procedures in other cases involving the Kansas 11 cents rate.[16] Here, the same procedures were available and required. Cities, however, chose not to avail itself of these required remedies, but "elected" instead to await the outcome of collateral litigation involving a state pricing order, and then to seek still another collateral determination as to a rate inconsistent with Commission actions under Sections 4, 5(a) and 7.

Antecedent contracts underlie most rates filed with the Commission under the Natural Gas Act, and disputes over one clause or another, at any particular time, are legion.[17] If, in disregard of Commission procedures, courts may decide such disputes collaterally and enforce contract price

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[16] In *Cities Service Gas Co.* v. *Federal Power Commission, supra,* Cities protested Commission action in accepting for filing a rate based on the Kansas order, and appealed to the Federal Court after application for rehearing and timely petition for review under Section 19(b). And in *Pan American Petroleum Corp.,* 24 FPC 1051, 1053 (1960) Cities urged the Commission to condition a proposed certificate of public convenience and necessity so as not to give recognition to the 11 cents Kansas rate as effective. See also *Cities Service Gas Co.,* 14 FPC 134 (1955), aff'd sub nom. *Signal Oil & Gas Co.* v. *Federal Power Commission, supra,* and *Tennessee Gas Transmission Co.* v. *Federal Power Commission,* 322 F. 2d 1006 (D.C. Cir. 1963).

[17] The question of the legal effect of Commission action accepting a tendered rate for filing, at issue below, is applicable to a substantial number of all producers' rates on file today. From 1957 to 1965, 6,661 rate increase filings by independent producers were permitted to become effective by Commission acceptance for filing and without suspension. (Thirty-seventh through Forty-fifth Annual Reports of the Federal Power Commission for fiscal years 1957-1965).

provisions as construed by them, the rates become not what the Commission permits to become effective but what the first court to act decides they are. Such collateral determinations then undermine Commission issuance under Section 7 of Certificates with or without rate conditions under the "in-line" pricing doctrine of *Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U.S. 378 (1959). Conflicting court and Commission actions also create further confusion as to controlling, effective rates in still other collateral litigation, such as the pending Kansas suit by royalty owners against Western.[18] And, in proceedings before the Commission such as the pending Hugoton-Anadarko Area Rate Case under Sections 4 and 5, all cost and revenue comparisons obviously are subject to substantial change depending upon whether it is correct to use the 11 cents filed rate (as the Commission did in disposing of its Section 5(a) proceeding questioning Petitioner's rates), or the 8 cent price determined by the Delaware courts. Recent Commission attempts to control the disposition of refunds[19] likewise become futile if state courts are free to determine not only the effective rate level, but also the entitlement of one party or another to specific amounts under conflicting state law theories.

The collateral determination thus interjects confusion into the regulatory system, is not dispositive of the controversy as it affects the interests of the Commission and other persons who are not parties, and destroys the certainty

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[18] See n. 11, *supra.* Under the theories adopted by the Delaware courts, Western thus could be required to refund to Cities all amounts collected in excess of 8 cents per Mcf; held liable in Kansas to account to royalty owners on the basis of an 11 cents per Mcf or higher rate; and held in the "area rate" case before the Commission to be entitled to retain as a minimum all amounts collected at rates not exceeding the 11 cents level.

[19] See *Texas Eastern Transmission Corp.* v. *Federal Power Commission,* 357 F. 2d 232 (5th Cir. 1966).

intended to flow from Commission actions upon the rate under Sections 7, 4 and 5. The practical effect of the decision below and similar decisions by the Eighth and Tenth Circuits conflicting with the "filed rate" principle[20] thus is far-reaching. If, for example, Cities can prevail in a state court, any buyer claiming to be aggrieved by allegedly illegal rates can do the same. If this is true, the seller can, in turn, seek judgment in a court of its own choosing before or after the filing of such a suit by the buyer. Moreover, while the Delaware court has sanctioned a lesser rate in this case, another court may well sanction higher rates in future cases, such as the pending suits between royalty owners and producers, despite any disposition the Commission may have to the contrary. If this decision is allowed to stand, there may well be three jurisdictions adjudicating rights relative to each and every disputed rate — the Commission, the court chosen by the buyer, and the court chosen by the seller.

This Court has made clear that the "filed rate" principle applies under the Interstate Commerce and Federal Power Acts,[21] and the same must now be said as to the Natural Gas Act. If a court proceeds as the Delaware courts have, a rate previously definite and certain by Commission action under Section 4, recognized by issuance of a Certificate under Section 7, and utilized in testing revenues in a Section 5(a) rate case, is effectively nullified by action outside the Act's procedures and contrary to its design.

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[20] See cases cited in n. 15, *supra*.

[21] *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951); *United States* v. *Jones*, 336 U.S. 641 (1949); *United States* v. *Interstate Commerce Commission*, 337 U.S. 426 (1949).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted and the decision below reversed.

Respectfully submitted,

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January 24, 1967

APPENDIX A

1. The Natural Gas Act, 52 Stat. 821 (1938), as amended, 15 U.S.C. § 717, *et seq.*, provides in pertinent part:

> Section 4(c). Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.
>
> Section 4(d). Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published. [52 Stat. 822 (1938), 15 U.S.C. § 717c]

Section 5(a). Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates. [52 Stat. 823 (1938), 15 U.S.C. § 717d]

* * * * * * * * *

Section 7(c). No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public conven-

ience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942), 15 U.S.C. § 717f(c)]

* * * * * * * * *

Section 7(e). Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f(e)].

* * * * * * * * *

APPENDIX B

(Opinion and Judgment of the Superior Court of the State of Delaware in and for New Castle County)

No. 58, 1962

CITIES SERVICE GAS COMPANY

v.

WESTERN NATURAL GAS COMPANY

MEMORANDUM OF DECISION

(May 24, 1960)

On cross motions for summary judgment and defendant's motions to dismiss all of or a portion of the complaint.

John J. Morris, Jr. and Howard L. Williams (Morris, James, Hitchens & Williams) Attorneys for Plaintiff; Conrad C. Mount, Joe Rolston, Gordon J. Quilter and Robert R. McCracken, all of Oklahoma City, Oklahoma, of counsel.

Clair John Killoran (Killoran & VanBrunt) Attorney for Defendant; George D. Horning, Jr. and Patrick G. Sullivan (Hogan & Hartson) both of Washington, D.C.; and John C. Dawson (Liddell, Austin, Dawson & Huggins) Houston, Texas, of counsel.

CHRISTIE, J.:

Many of the facts in this case are substantially similar to those in *Cities Service Gas Company* v. *Columbian Fuel Corporation,* as recited in Storey , 155 A.2d 879, and in the related Supreme Court case at Storey , 158 A.2d 478 (application for certiorari now pending in the United States Supreme Court). A new recital of the facts will not be made here

although new or different factual matter has been considered and will be touched upon herein.

One of the differences between this case and the cases cited above is that here defendant has filed a counterclaim based on plaintiff's failure to pay amounts alleged to be due under defendant's "filed rate theory" since December 23, 1957. The counterclaim is not separately discussed in this memorandum since the decision on the merits of the original claim effectively disposes thereof.

I

Defendants motions are based largely on the following grounds:

(1) *Lack of jurisdiction in this Court.* This matter has been decided by the Delaware Supreme Court in *Columbian Fuel Corp., etc.* v. *Superior Court, etc. and Cities Service Gas Company,* Storey , 158 A.2d 478 (1960).

(2) *Failure of plaintiff to exhaust its administrative remedies.* Although this argument may not have been developed in the prior cases, nevertheless, I find it to have no merit in view of the rulings of this Court and the Supreme Court referred to above. No administrative remedy exists before the Federal Power Commission for the recovery of the money here sought. Since this Court does have jurisdiction and the Federal Power Commission does not have jurisdiction as to the remedy here sought, the rule that the parties must exhaust their administrative remedies finds no application here. Although the F.P.C. might, in its discretion, render a declaratory order or some other decision which might have an important bearing on some of the issues in this case, such possibility does not amount to an administrative

remedy which precludes plaintiff from seeking a complete remedy in this Court.

(3) *A part of plaintiff's claim is barred by the statute of limitations.* This argument is new in this case and will be dealt with herein.

The action was filed June 16, 1958. In this action, plaintiff seeks refunds for payments made by it for a period from January 1, 1954 to December 22, 1957. If the three year statute of limitations is applicable then that portion of the action which accrued prior to June 16, 1955 is barred.

The Delaware statute of limitations reads as follows:

"*Actions subject to the three-year limitation*

"No action to recover damages for trespass, no action to regain possession of personal chattels, no action to recover damages for the detention of personal chattels, no action to recover a debt not evidenced by a record or by an instrument under seal, no action based on a detailed statement of the mutual demands in the nature of debit and credit between parties arising out of contractual or fiduciary relations, no action based on a promise, no action based on a statute, and no action to recover damages caused by an injury unaccompanied with force or resulting indirectly from the act of the defendant shall be brought after the expiration of 3 years from the accruing of the cause of such action . . ." (10 Delaware Code § 8106)

Another section provides that where the cause of action originally accrued in favor of a person who at the time of such accrual was a resident of this State, the time limited by the law of this State shall apply. 10 Del. Code § 8120. Plaintiff as a Delaware corporation is a resident of this State.

Statutes of limitations begin to run when proper parties are in existence capable of suing and being sued, and a

cause of action exists capable of being sued on forthwith. *Keller* v. *Farmers Bank of State of Delaware,* 2 Terry 471, 24 A.2d 539 (Superior Ct., 1942). The parties do not disagree with this basic rule. A dispute arises from differing views as to the date on which the cause of action accrued or came into existence.

Defendant maintains that plaintiff's causes of action accrued as to each payment at the time the alleged overpayments was made. Thus, defendant insists that all claims based on payments made more than three years before June 16, 1958 are barred.

Plaintiff, on the other hand, maintains that the action did not accrue until January 20, 1958, when the United States Supreme Court declared the Kansas price order invalid. If plaintiff's contention is correct, then no part of the claim is barred by the statute.

Defendant points out that the minimum price order was not directly applicable to plaintiff and argues plaintiff could have simply refused to pay the price required under such order, since it applied to producers and not to purchasers. Thus, says defendant, there was no mandatory requirement for Cities to challenge the validity of the order before instituting an action for restitution and there was no restraint preventing Cities from instituting the action as soon as an alleged overpayment was made. It is argued that since nothing prevented plaintiff from suing as soon as the first payment was made, the statute of limitations began to run.

The case most nearly on point is *Natural Gas Pipeline Co. of America* v. *Harrington,* 139 F. Supp. 452, 461 (N.D. Texas 1956) affirmed 246 F.2d 915, 921 (5th Cir. 1957). The facts in that case were substantially similar to those of the case at bar. The District Court there held that the cause of action did not arise until the final determination

of the invalidity of a minimum price order similar to the order here involved. The Circuit Court affirmed the decision and adopted the same view as to when the cause of action arose.

It has often been held that a statute of limitations does not begin to run as to an action for restitution until the erroneous judgment or decree under which the money was paid is reversed. *Simmons* v. *Simmons,* 91 W.Va. 32, 112 S.E. 189 (1922); *Hudson's Estate* v. *Evans,* 11 S.W.2d 825 (Tex. 1928); *Kurn* v. *Pittsburgh Plate Glass Co.,* 48 F. Supp. 574 (D.C. Mo. 1942); *Restatement, Restitution* § 74. See also *Morford* v. *Bellanca Aircraft Corporation,* 6 Terry 129, 67 A.2d 542, 547 (Superior Ct. 1949) and *Abramson* v. *Delrose, Inc.,* 132 F.Supp. 440 (D.C. Del. 1955).

On the other hand, defendant cites a number of cases where the statute of limitations has been held to run from the time of an erroneous payment and not from the time that the right to recovery was established. *Brink* v. *Kansas City,* 358 Mo. 845, 217 S.W.2d 507 (1949) (an invalid tax assessment); *Washington Sec. Co.* v. *State,* 9 Wash. 2d 197, 114 P.2d 965 (1941) (an overpayment to the state for land); *Broadwell* v. *Board of Comm'rs.,* 88 Okla. 147, 211 Pac. 1040 (1922) (taxes paid on non-taxable land); *Ball* v. *United States,* 137 F.Supp. 740 (1st Cir.) cert. denied 352 U.S. 827 (1956) (suit for back pay after a District Court had determined that a serviceman had been improperly reduced in rank).

Although it may be true that the minimum price order did not apply directly to plaintiff, defendant attaches an unwarranted legal significance to this fact. A realistic appraisal of the legal situation as it existed prior to the United States Supreme Court's decision rendered Janu-

ary 20, 1958 indicates that plaintiff was under a legal obligation, if it wished to purchase the gas, to pay the rates specified in the order.

Plaintiff would have been a party to a violation of state law if it had purchased the gas at rates lower than those specified in the price order. Plaintiff had an apparent duty to comply with state law and regulations promulgated thereunder until such law was changed or declared invalid. Under the circumstances, I find the authorities cited by plaintiff state the rules of law which should be applied in the case at bar. Because the minimum price order prevented the recovery plaintiff seeks, no right of action, which was capable of being sued on forthwith, existed in plaintiff before January 20, 1958.

The minimum price order in this case was a sweeping substantive regulation going far beyond the realm of mere administrative or procedural detail. In many respects it had the effect of a statute. A void regulation of general application which has the effect of a statute is roughly equivalent to an erroneous holding by a judicial body insofar as the period of limitations is concerned. The right to recover funds paid on account of the erroneous judicial decision or the void statute depends upon a change in what then appears to be the applicable law. The need to change the apparently applicable law in cases such as these is in contrast with the need to correct an error which does not involve a change in the law. In cases such as the one before the Court, a right of action does not accrue until the law which forbids the recovery is declared void. On the other hand and in the case of erroneous administrative acts such as the collection of taxes not due, payment for land already owned or unauthorized demotion of military personnel, the right to recovery depends not upon a change in the apparently applicable

law but rather upon making a proper showing under the existing law. In those cases the period of limitations is often measured from the date of the error.

I find that the approach outlined above has many defects and tends to explain only part of the apparent conflict between the rules laid down in some of the authorities cited by the parties. However, under the peculiar circumstances of the case at bar, it is clear that the right of action for restitution did not accrue until January 20, 1958 and I so hold. To the extent that the authorities cited by defendant tend to indicate a different holding, I decline to follow them.

The above discussion of the period of limitations applies to the restitution phase of this case. Plaintiff also seeks to recover on the theory of an express contract, which plaintiff says came into existence when defendant accepted the increased payments subject to the reservations noted in plaintiff's letters dated August 25, 1953 and January 21, 1954. If an express contract exists, it is clear by the terms thereof that action thereon is not barred by the period of limitations.

II

Plaintiff's motion for summary judgment is based on voluminous record already compiled by pre-trial procedures in this case. The pertinent facts are not in dispute. Except for the obvious differences in amounts of gas delivered, the contract prices and the amounts claimed, the pertinent legally significant facts are substantially similar to the facts outlined in the *Columbian* case.

The issues raised by this motion were discussed in the dicta contained in the opinion in the *Columbian Fuel Corp.* case, *supra*. The argument in this case was made before

the decision in the *Columbian* case was rendered, and the briefs in both cases were before me before the first decision. The decision as to jurisdiction in the *Columbian* case was affirmed by the Delaware Supreme Court (158 A.2d 478). Since the review by the Supreme Court was on petition for writ of prohibition, there was no review of the merits of that decision. Furthermore, this Court has not yet addressed itself to plaintiff's motion for summary judgment in the *Columbian* case.

However, I continue to be of the opinion that my earlier opinion and the dicta contained therein correctly state the law as it applies to the *Columbian* case and the case at bar. Since this Court's decision was rendered, similar conclusions were reached in a similar case in the United States District Court for the District of Nebraska, after a careful consideration of most of the arguments here raised. *Kansas-Nebraska Natural Gas Co.* v. *Pan American Petroleum Corp.*, an unreported oral decision by Judge Robert Van Pelt.

A number of other issues were raised in the pleadings at argument which have not been specifically discussed in this memorandum or the prior decision. These issues are resolved so as to be consistent with the decision herein announced.

I find that the pleadings state a cause of action for restitution and the undisputed facts support the essential allegations of the pleadings. Therefore, plaintiff is entitled to the restitution it here seeks.

Defendant's motion will be denied. Plaintiff's motion for summary judgment in its favor is granted as to the original claim and as to the counterclaim.

Order and Final Judgment

AND NOW TO WIT this 25th day of June, 1962, each of the parties hereto having moved for summary judgment, and the defendant having filed motions for reargument on June 3, 1960, and May 17, 1962, and the matters having been briefed and argued, and the Court having rendered its Memoranda of Decision dated May 24, 1960, June 20, 1960 and May 11, 1962, and its Letter Opinion of May 25, 1962, it is

ORDERED, that defendant's motion for summary judgment is denied; and it is

FURTHER ORDERED, that the defendant's motions for reargument are denied; and it is

FURTHER ORDERED, that plaintiff's motion for summary judgment is granted and judgment is hereby entered for plaintiff against defendant for the sum of $1,264,826.89 with simple interest thereon at the rate of six (6) percentum per annum from January 20, 1958, plus the costs of this action.

/s/ ANDREW D. CHRISTIE
Judge

APPENDIX C

(Opinion and Judgment of the Supreme Court of Delaware)

IN THE SUPREME COURT OF THE STATE OF DELAWARE

No. 58, 1962

WESTERN NATURAL GAS COMPANY, Appellant,

vs.

CITIES SERVICE GAS COMPANY, Appellee.

(May 21, 1964)

Terry, Chief Justice, and Wolcott and Carey, JJ., sitting.

Appeal from summary judgment for plaintiff entered in the Superior Court of New Castle County.

Clair J. Killoran and Courtney H. Cummings, Jr., of Killoran and Van Brunt, of Wilmington, and Hogan & Hartson, of Washington, D. C., and John C. Dawson, of Liddell, Austin, Dawson & Sapp, of Houston, Texas, and J. Colin Lizotte, of Enright & Lizotte, of Milford, New Hampshire, for appellant.

Howard L. Williams and Henry N. Herndon, Jr., of Morris, James, Hitchens and Williams, of Wilmington, and C. C. Mount and Charles V. Wheeler, of Oklahoma City, for appellee.

Carey, J. (for a majority of the court):

The defendant below has appealed from an order of the Superior Court granting summary judgment to the appellee. Cities Service Gas Company (Cities) operates an interstate pipe line company and Western Natural Gas Company (Western) is a producer of natural gas. The action was brought to recover alleged overpayments for natural gas purchased by Cities from Western from Janu-

ary 1, 1954 to January 1958. The matter is now before this Court on motions of both parties for reargument. This Court previously filed majority and dissenting opinions, but the petitions for reargument were granted. Following this, the former Chief Justice left the bench and the reargument therefore covered all phases of the case. Because we have concluded to withdraw the prior opinions, it is necessary to discuss the matter in full.

Two earlier cases involving these overpayment actions have been passed upon by this Court. See Columbian Fuel Corporation and Pan-American Petroleum Corporation v. Superior Court, 52 Del. 365, 158 A. 2d 478; aff'd. 366 U.S. 656, 81 S. Ct. 1303, 6 L. Ed. 2d 584; Helmerich & Payne v. Colorado Interstate Gas Company, ... Del. ....., 187 A. 2d 67.

The background of this case and many of the pertinent facts giving rise to the action are to a great extent the same as in the first cited case, which involved a similar suit for overpayments brought by Cities in the Superior Court. For a discussion of the Kansas minimum price order effective January 1, 1954, Cities' letters of protest to its suppliers of gas and payments for gas at the rate fixed by the order, Cities attack on the Kansas order, and the final voiding of the order on January 20, 1958 by the Supreme Court of the United States, see the opinion in the Columbian case, supra. Cities' protest letter to Western appears to be identical with that sent to Columbian and Pan-American. We see no reason to repeat these matters in this opinion.

In this case, as in the former cases, the producer, after the Federal Power Commission had assumed jurisdiction in June 1954, filed a copy of the contract and the Kansas price order with the Commission to establish the rate for gas between the parties. A copy of the protest letter was not filed.

The present case raises issues not directly involved in the Columbian case, which presented primarily the question of the jurisdiction of a state court to entertain the suits for refunds. That jurisdiction was upheld, but the merits, i.e., the right to recover, were not involved. See 366 U.S. 656, 81 S. Ct. 1303.

In granting summary judgment to Cities, the trial Judge held:

1. The pleadings state a good cause of action for restitution, and the undisputed facts support the pleadings.

2. Plaintiff has no administrative remedy.

3. Plaintiff is entitled to interest from the date the Kansas order was declared invalid.

4. The statute of limitations does not bar the action.

All of these holdings are challenged by Western.

The contract between the parties set a price of 8¢ per M. C. F. but it contained the following clause:

> "This agreement is subject to all present and future laws and valid orders, rules and regulations of any regulatory body having jurisdiction."

The contract price could, therefore, be changed by mutual agreement, or by promulgation of a valid regulation by a governmental authority having jurisdiction to do so. Had the Kansas regulation been valid, the result would have been an automatic increase in the contract rate to 11¢. Being invalid and void ab initio, the regulation itself in fact made no change in that contract price. Prior to June 1954, when the Federal Power Commission first asserted jurisdiction, there is no basis for saying that Cities was contractually bound to pay 11¢.

Western contends, however, that the legally effective rate became 11¢ commencing in June 1954 when the Federal Power Commission first asserted jurisdiction, wherefore Western argues that a state court has no power to change it retroactively by ordering repayments.

This argument was dealt with in the Columbian case, supra, wherein this Court cited several Federal decisions. To them may be added Pan-American Petroleum Corporation v. Kansas-Nebraska Natural Gas Company, Inc., 8 Cir., 297 F. 2d 561. It was held that the Natural Gas Act is not inconsistent with reimbursement for overpayments, because the Kansas order was void ab initio and the contract rate controlled.

Western makes another contention which concerns not only the matter of the effective rate, but also the power of a state court to decide the matter. This argument is based on two proceedings before the Federal Power Commission.

The first proceeding was originated by a complaint filed on August 31, 1955 by Tennessee Public Service Commission and others with respect to rates charged by Western. Thereupon, the Commission instituted an investigation into all the rates charged or collected by Western. It held a number of hearings. Cities did not seek to intervene. On December 31, 1959, the presiding examiner made a finding that Western's rates had not been shown to be unjust. He also stated that dismissal of the complaint would have the effect of determinating that the existing rates would be continued. As the 11¢ rate was one of those under consideration, Western now contends that the Commission in fact adjudicated the rate. The answer to this suggestion is that the Commission itself modified the Examiner's findings. Its final order expressly held that it was making no

determination as to whether Western's individual rates were just and reasonable, that its dismissal of the complaint was not a determination that the existing rates should be continued, that it did not adopt the examiner's finding to the effect that none of those rates had been shown to be unjust or unreasonable. Moreover, it expressly directed that its order was not to be construed as a determination of what the effective legal rates are or have been for jurisdictional sales by Western.

In another proceeding before the Commission, Western complained against Cities for failure to pay the 11¢ rate, Cities having ceased to pay it after the Kansas regulation was declared void. Later Western requested that this proceeding be consolidated with another matter pending before the Commission. The Commission denied the application to consolidate, holding inter alia, as follows:

> "Since litigation is now pending between the parties concerning the lawful rate for the sale and purchase of gas, it is neither necessary, appropriate, nor in the public interest for the Commission at this time to undertake to determine the rates for those sales . . . ."

This language appears to amount to a disclaimer of jurisdiction over the dispute now before us.

In a separate proceeding, the Commission had before it a proposal to amend its rules so as to provide for the rejection of any tender for filing to the extent that the filing was based on a State-prescribed minimum price. This proceeding was initiated on April 28, 1958 and early in 1962 the Commission decided to terminate that proceeding, stating that "at this late date a rule making proceeding would be a cumbersome and inappropriate means by which to exercise our jurisdiction over the matters involved here . . . . We recognize, moreover, that a buyer of

natural gas who has paid seller on the basis of a State minimum price law can invoke the jurisdiction of an appropriate Court in the event that his contract provides for a refund if the State minimum price laws are held invalid".

The foregoing language seems to emphasize that the Commission has disclaimed jurisdiction over the subject matter of refund litigation growing out of rate filings based on State minimum price orders, or, at least has recognized the existence of such jurisdiction in State Courts.

We are accordingly of the opinion that nothing done by the Commission has altered the contract rate or fixed a minimum price of 11¢ for the period within which we are concerned. We also continue to be of the opinion that our Superior Court has jurisdiction to determine this matter.

The net result is that neither the invalid Kansas regulation nor any action of the Federal Power Commission made any change in the price of 8¢ which was accordingly the *effective* rate throughout the pertinent period. It follows that, had Cities paid only 8¢, Western would have no valid ground to sue for the excess. Of course, Cities did pay 11¢ up to the time of the Supreme Court decision, and the question is whether it may now recover the excess.

The complaint, as amended, contains three theories: (1) Cities protest letter of January 21st, 1954, followed by the notations on the monthly checks specifically referring to that letter and the acceptance of those checks by Western, constituted an agreement on the part of Western to refund the excess if and when the regulation was declared invalid; (2) the excess was paid by Cities because of business compulsion or duress and Cities is therefore entitled to restitution; (3) the excess was paid involuntarily and Western

was unjustly enriched thereby, wherefore Cities is entitled to restitution. The Court below held that a case for restitution was shown by the uncontradicted evidence in the record, and it declined to rule on the "contract" theory. Because that contention was not decided by the trial court and was not raised before us until the petition for reargument, we prefer not to decide it at this stage. The question we must pass upon is whether the undisputed evidence — consisting of affidavits, answers to request for admissions and certain allegations in the complaint admitted by the answer — justifies entry of summary judgment for Cities.

The ruling of the Court below is challenged by Western on several grounds: (1) the record does not justify a finding of business compulsion and there should at least be a trial before its existence can be determined; (2) payment of the excess was a voluntary one which can not be recovered, or, at least, it cannot be held involuntary without further proof; (3) the excess was paid by mistake of law for which no recovery may be had; (4) there has been no unjust enrichment because Cities was reimbursed by an increase in the rates paid by its customers and has therefore lost nothing; (5) the action is barred by the statute of limitations.

Although in the arguments before us much stress has been laid upon the theory of business compulsion or duress, that theory of recovery is not even mentioned in any of the opinions of the lower Court. At one point, in discussing the propriety of summary judgment, that Court refers to its prior holding in Cities Service Gas Co. v. Columbian Fuel Corp., 2 Storey 262, 52 Del. 262, 155 A. 2d 879, as being dispositive of many of the arguments made in this case. As we read the Columbian opinion, aside from the matter of jurisdiction, it deals primarily with a determination of the true "filed" or effective rate, counsel having conceded that

Columbian could not retain any money paid in excess thereof. No determination was made as to the existence of duress. In the present case, we have no such concession.

At another point in the opinion below, however, in dealing with the statute of limitations, the Court cites and relies upon decisions which allowed recovery of money paid under a judgment or decree which is subsequently reversed. See Restatement, Restitution Sec. 74. It points out the analogy between payments made by reason of such a reversed judgment and those made under a statute or substantive administrative regulation held to be void.

We are, accordingly, not certain as to just what was the true basis of the Court's finding, although clearly it was not predicated upon a contract to repay.

Of course, payment voluntarily made with full knowledge of the facts cannot be recovered, in the absence of a contract to repay. 40 Am. Jur. 822. A payment under protest is not necessarily involuntary, nor is it made so by unilaterally calling it involuntary at the time of payment; Natural Gas Pipeline Co. of America v. Harrington, 5 Cir., 246 F. 2d 915; Monaghan v. Lewis, 5 Penn. 218, 225, 59 A. 948; 40 Am. Jur. 820; but where money is paid because of duress, the payment is involuntary. The question is basically one of fact, although undisputed facts may justify summary judgment.

The plaintiff here maintains that the undisputed facts in the record require the finding of involuntariness by reason of duress. It contends that it was forced to pay the higher charge by the Kansas statute which carried criminal sanctions. These are cases holding that payments required to be made by an administrative order are similar in effect to those made pursuant to a judgment, the order constituting sufficient compulsion to render the

payment involuntary. Restitution has been ordered in such cases when the administrative order was declared invalid. 2 Am. Jur. 2d 676. In every instance we have seen of this type, however, the order was clearly applicable to both payor and payee. Here, the Kansas Supreme Court held, in Cities Service Gas Co. v. State Corporation Commission, 180 Kan. 454, 304 P. 2d. 528, that the order (therefore, presumably, the criminal sanctions) applied only to the seller. It is not suggested that Cities was motivated by the desire to protect Western against those sanctions. In other words, the order did not require Cities to pay, although it required Western to collect. Cities was mistaken if it believed that the statute was applicable to it, and this mistake was one of law for which restitution does not lie. The distinction we are now making is not a mere play upon words. The point is that the order did not force Cities to do anything.

It seems to us that plaintiff is thus obliged to fall back upon the theory of business duress, if there was no contract to refund. We do not have before us a finding of fact made after a hearing of testimony or upon a stipulation of facts; what we do have is a summary judgment, which may be entered only when there is no dispute of material fact and only one inference is justified. As applied here, to determine the propriety of the judgment below, we must decide whether the only reasonable conclusion is that Cities was compelled by duress to make the higher payments in order to meet its needs for gas.

In order to recover under the doctrine of business duress, Cities must, of course, demonstrate the actual existence of duress, as well as the likelihood that serious harm would occur to its business if it did not pay the increase. 17 Am. Jur. § 7. In charging duress in this case, Cities relies

heavily upon the Harrington case, supra. There, perhaps, an actual threat was made by the supplier to discontinue deliveries if the new rate was not paid; at least, the Court found that the buyer was justified in considering certain statements to be such a threat. See D.C., 139 F. Supp. 452. The present record contains nothing to show that Western made any threat or did anything else to force Cities to pay the higher price. In fact, § 7(b) of the Natural Gas Act prohibits a supplier from discontinuing service without permission of the Federal Power Commission. In short, the record does not establish what action Western would have taken had Cities refused to pay the higher price. We have already discussed the claim of duress arising from the Kansas regulation, and no other event or action constituting duress has been suggested.

In the second place, the record is insufficient to establish definitely a compelling necessity for Cities to continue purchasing from Western.

At the present stage, we cannot determine what additional evidence is required; we simply hold that the present record does not necessarily lead exclusively to the inference of involuntary payment by Cities. The record fails to establish duress; it also fails to establish that Cities was in imminent danger of suffering immediate and substantial economic injury as a result of any duress.

Two other defenses raised by Western will be mentioned. It points out that Cities received higher rates from its customers and concludes that it has sustained no loss. The real losers are Cities' customers and at least as to the "jurisdictional" customers, Cities is required by an order of the Federal Power Commission to refund to them any amounts recovered here. To this extent, certainly, we think that this argument constitutes no defense. The statute of limitations would not bar a recovery if business duress is

proven or it is to be ultimately determined that there was a contract to refund. Cf. Helmerich & Payne v. Colorado Interstate Gas Company, supra.

We do not foreclose Cities from reasserting its "contract" argument in the Court below. Because we cannot predict the ultimate conclusion of the trial Court as to either theory, we think it inadvisable at this time to determine the other questions raised, such as the amount of recovery, if any, and the matter of interest.

The prior opinions are withdrawn, and the decision of the Court below is reversed with directions to proceed in accordance herewith.

WOLCOTT, J. (dissenting):

I dissent from the conclusion reached by the majority that this case must be remanded for further proceedings. I would affirm the judgment below because, in my opinion, the record contains sufficient to demonstrate that Cities paid Western the 11¢ rate for gas under business compulsion, which therefore makes the payment of the excess involuntary on the part of Cities. The majority takes the view that the record is incomplete in this respect. I disagree.

When the Kansas order fixing the price at 11¢ was first promulgated it applied on its face to all who "take gas or cause gas to be taken" from the Hugoton Field. It seems plain, therefore, that until December 8, 1956, when the Supreme Court of Kansas in an attempt to save the order "construed" it to apply only to producers, 180 Kan. 454, 304 P. 2d 528, Cities was justified in thinking the order applicable to it and that a violation by it would have subjected it to criminal sanctions. Thus, it seems proper to me to conclude that from January 1, 1954 to December 8,

1956, at least, Cities was paying the additional 3¢ under the compulsion of fear of the criminal sanctions of the order, in part at least.

But of more importance in this respect is the fact that Western admittedly would have been subjected to the criminal sanctions of the order if it had sold gas to Cities at less than the 11¢ rate. Cities had to have the gas to supply its customers. It could obtain that gas from the Hugoton Field only by purchasing at 11¢ from Western to which it was bound by contract. Under the circumstances, Cities took the only reasonable course — it paid under protest and took steps to invalidate the order.

The majority says that the record is silent as to whether or not Western would have refused delivery to Cities if tendered the 8¢ contract price. If such was the fact, that is, if Western would have delivered for 8¢ and thus have deliberately flouted the Kansas order, admittedly applicable to it, that fact should have been made to appear affirmatively in the record by Western. It does not appear, and it does not seem reasonable to assume that Western would have had such little regard for the laws of Kansas within whose boundaries it was producing natural gas.

The majority says that Cities has made no showing that it could not have acquired the necessary gas from other sources, or from its own reserves. Why should it be required to make such a showing? It had a contract with Western to supply its needs. To this contract both were bound.

I think this case is similar to *Natural Gas Pipeline Co. of America* v. *Harrington,* 246 F. 2d 915, which should lead this Court to affirm the judgment below.

Mandate

THE SUPREME COURT OF THE STATE OF DELAWARE

To the Honorable the Judges of The Superior Court of the State of Delaware in and for New Castle County:

GREETING:

WHEREAS, before you or some of you in a cause entitled as follows:

C.A. No. 674, 1958

CITIES SERVICE GAS COMPANY

v.

WESTERN NATURAL GAS COMPANY

a certain judgment or order was entered on the 25th day of June 1962, to which reference is hereby made; and

WHEREAS, by appropriate proceedings the said cause was duly appealed to this Court, and after hearing has been finally determined, as appears from the opinion of this Court filed in the cause on May 21, 1964, a certified copy of which is attached hereto;

ON CONSIDERATION WHEREOF IT IS ORDERED AND ADJUDGED that the said judgment or order be and it is hereby reversed, with costs, hereby taxed in the sum of Twelve Dollars No Cents — Dollars ($12.00) to be recovered by Western Natural Gas Company against Cities Service Gas Company, with right of execution; and the said cause is hereby remanded with instructions to take such further proceedings therein as may be necessary in conformity with the opinion of this Court.

WITNESS The Honorable Charles L. Terry, Jr., our Chief Justice at Dover, the first day of January, A.D. 1964.

Issued June 5, 1964.

E. TOWNSEND, JR.
Clerk of the Supreme Court

APPENDIX D

(Opinion and Judgment of the Superior Court of the State of Delaware in and for New Castle County.)

MEMORANDUM
(December 10, 1965)

Howard L. Williams, Esquire and Henry N. Herndon, Jr., Esquire, of the firm of Morris, James, Hitchens and Williams, Wilmington, Delaware, Conrad C. Mount, Esquire, and Charles V. Wheeler, Esquire, of counsel of Oklahoma City, Oklahoma, attorneys for plaintiff.

Clair J. Killoran, Esquire, and Courtney H. Cummings, Esquire, of the firm of Killoran and Van Brunt, Wilmington, Delaware, and Willis Witt, Esquire, of the firm of Liddell, Austin, Dawson & Sapp, of counsel, Houston, Texas, attorneys for defendant.

CHRISTIE, J.

This is an action by Cities Service Gas Company, an interstate pipeline company, against Western Natural Gas Company, a producer of natural gas, to recover alleged overpayments for natural gas purchased by Cities from Western from January 1, 1954 to January 1, 1958.

The case was filed in 1958. It is one of many cases filed after the United States Supreme Court declared invalid the attempt of the State of Kansas to regulate prices received by natural gas producers.

The jurisdiction of this Court to hear "natural gas rebate cases" similar to this case was litigated in this Court, the Delaware Supreme Court and the United States Supreme Court. *Cities Service Gas Co.* v. *Columbian Fuel Corp.*, 2 Storey 262, 155 A. 2d 879 (Super. Ct. 1959); *Columbian Fuel Corporation and Pan-American Petroleum*

Corp. v. *Superior Court,* 2 Storey 365, 158 A. 2d 478 (1960); Aff'd 366 U.S. 656, 81 S. Ct. 1303 (1961).

Meanwhile cross motions for summary judgment and defendant's motion to dismiss were argued in this Court. By unreported memorandum of decision dated May 24, 1960, plaintiff's motion for summary judgment was granted and defendant's motions were denied. Western appealed to the Delaware Supreme Court which reversed upon the ground that the summary judgment in favor of plaintiff entered in Superior Court must have rested upon a finding of business duress and there was no showing that such duress existed. *Western Natural Gas Company* v. *Cities Service Gas Company,* .... Storey ....., 201 A. 2d 164 (1964). It was ordered that the case be returned to the Superior Court for further proceedings. Although Western prevailed in the Delaware Supreme Court, it sought certiorari in the United States Supreme Court because certain rulings by the State Courts as to the gas rates filed with the Federal Power Commission eliminated one of the defenses urged by Western. Certiorari was denied. 379 U.S. 905, 85 S. Ct. 189 (1964).

The ruling of this Court which was reversed was based upon the record made in respect to plaintiff's contentions that refunds were due under the equitable doctrines of restitution and unjust enrichment. This Court and the Supreme Court declined to consider or pass upon plaintiff's alternative theory that there was a contract to refund. Plaintiff has now moved for summary judgment upon its contract theory of recovery.

I will not repeat in any detail the background facts which appear in some of the opinions already cited. The basic facts upon which plaintiff relies to establish a right to recover under a contract to refund are undisputed.

Defendant, Western, is a producer of natural gas in the Kansas-Hugoton Field and is subject to the jurisdiction of the Federal Power Commission as a natural gas company within the meaning of the Natural Gas Act, 15 U.S.C. § 717. Defendant sells the natural gas to plaintiff, Cities, in interstate commerce for resale to others by plaintiff.

On September 29, 1949, plaintiff and defendant entered into a fixed price contract under which plaintiff agreed to purchase natural gas produced by defendant from the Hugoton Field in Kansas at a price of 8¢ per thousand cubic feet (Mcf).

On December 2, 1953, the Corporation Commission of the State of Kansas promulgated its Minimum Price Order fixing a minimum price of 11¢ per Mcf to be paid for natural gas produced from the Kansas-Hugoton Field, effective January 1, 1954. The ordered price was substantially in excess of the 8¢ price fixed in the Gas Purchase Contract between the parties.

Plaintiff immediately filed suit in the Kansas courts challenging the validity of the Order.

On January 21, 1954, before any payments as to which refunds are claimed were made, plaintiff sent (and within a day or two thereafter, defendant received) a letter which read as follows:

> "The State Corporation Commission of the State of Kansas by Order dated December 2, 1953, in Docket No. 44099-C (C-3216) directed that on and after January 1, 1954, as a condition precedent for withdrawal of gas from the Hugoton Gas Field in Kansas, there shall be paid therefor or attributed thereto, at the wellhead, a minimum price of not less than eleven cents (11¢) per Mcf (14.65 pounds p.s.i.a.).

"Cities Service Gas Company and certain other parties filed petitions in the District Court of Finney County, Kansas, for a judicial review of the said Order.

"Pending final judicial determination of the said Order and beginning January 1, 1954, Cities Service Gas Company intends to pay for all gas purchased by it in the Kansas-Hugoton Field in strict compliance with the terms and conditions of the said Order. Such compliance with said Order by this Company, however, is made to avoid the penalities provided by the Kansas statutes for a violation thereof, and the payments made to you in compliance with said Order pending its final judicial determination are to be considered and accepted by you as involuntary payments on our part, without prejudice to our rights in said litigation, and in no event as an acquiescence by us in the validity of said Order.

"In the event the said Order is finally judicially modified or declared to be invalid in whole or in part, as a result of which you have been overpaid for gas purchased during the interim aforesaid, Cities Service Gas Company will expect you to refund to it the amount of said overpayments."

Thereafter each check sent to defendant by plaintiff had a voucher attached thereto which recited that payment was made subject to the provisions of the letter of January 21, 1954. Defendant accepted and cashed the checks.

In 1956, the Supreme Court of Kansas sustained the validity of the Kansas Minimum Price Order *Cities Service Gas Co.* v. *State Corporation Commission,* 180 Kan. 454, 304 P. 2d 528 (1956), but on appeal the Supreme Court of the United States on January 20, 1958, reversed 355 U.S. 391, 78 S. Ct. 381, 2 L. Ed. 2d 355, citing *Phillips Petroleum Co.* v. *State of Wisconsin,* 347 U.S. 672, 98 L. Ed. 1035, 74 S. Ct. 794 (1954), and *Natural Gas Pipeline Co.* v. *Panoma Corp.,* 349 U.S. 44, 99 L. Ed. 866, 75 S. Ct. 576 (1955).

Following the January 20, 1958, decision of the United States Supreme Court, Plaintiff resumed payments for gas purchased from defendant at the contract price of 8¢ per Mcf and made demand upon defendant for refund of the difference between the contract price and the amount paid for gas at the 11¢ price fixed in the void Order. Upon defendant's refusal to make refund, plaintiff commenced this action to recover the overpayments and lawful interest thereon.

I am of the opinion that under all the circumstances plaintiff's letter of January 21, 1954, constituted an offer and that defendant's acceptance of the funds transmitted by checks with the written reference to such letter attached thereto constituted an acceptance of the offer.

Numerous cases arising from factual situations strikingly similar to those here present have resulted in judgments for those seeking such refunds. Most of these decisions rest upon the theory of restitution and not upon an express contract to refund. Two cases, however, resulted in judgments for the plaintiff on a contract theory.

Upon evidence which corresponds in many respects to the facts in this case, the Court of Appeals for the Tenth Circuit, in *Landon* v. *Northern Natural Gas Co.*, 338 F. 2d 17 (10th Cir., 1964), held that the offer made in the letter and the acceptance of the checks tendered subject to the letter constituted a contract to refund. The Court stated:

> "The record supports the finding of the trial court that the refund letters together with the acceptance and endorsement of the gas payment checks constituted a refund contract. Appellant at no time prior to his answer filed herein objected or excepted in any manner to the letters or checks, nor suggested any other basis." (338 F. 2d at 19).

The decision of the Court of Appeals affirmed the trial court whose opinion is reported as *Northern Natural Gas Co.* v. *Landon,* 212 F. Supp. 856 (D.C. Kan. 1961). There the Court held:

> "We now come to the question as to whether a contract for refund existed between Northern and Landon. The United States District Court for the Northern District of Oklahoma has recently ruled on this question. Almost identical facts were there present as in the present case. The court held a letter to defendant, stating that the eleven-cent payment was to be made under protest, was an offer to pay on condition of refund. Also, that the acceptance of the checks by defendant with endorsements, similar to the ones in the present case, was acceptance of plaintiff's offer. *Cities Service Gas Co.* v. *United Producing Co.,* Civil No. 4554, N.D. Okla., Dec. 18, 1959.
>
> "The Kansas law, which governs this question, is that an unliquidated debt may be discharged by tender and acceptance of a payment conditioned on complete satisfaction of the debt. *Neely* v. *Thompson,* 68 Kan. 193 75 Pac. 117 (1904). From this authority plaintiff urges that a refund contract can be made by conditioning a payment upon refund in case a certain event happens. An analogous situation is found in *Autographic Register Co.* v. *Philip Hano Co.,* 198 F. 2d 208 (1st Cir. 1952), where royalty payments were made upon condition of refund in the event the patents were adjudicated to be infringements.
>
> "I hold that the letters written by Northern constituted an offer in a contract for refund and that Landon's acceptance of the checks containing reference to the letters was acceptance of the offer. I also hold that the refund contract so arrived at modified and supplemented the original contracts."

The decisions in the *Landon* case are in accord with the decision of the United States District Court for the North-

ern District of Oklahoma in *Cities Service Gas Co.* v. *United Producing Co.*, 212 F. Supp. 116 (D.C. Okla. 1960) in which the Court held:

> "9. Plaintiff's letter, dated January 21, 1954, plaintiff's Exhibit 4, constituted a tender of the minimum price of 11¢ per Mcf upon condition that the difference between the contract price, 7¢ per Mcf, 16.4# psia, and the price paid in compliance with the invalid Kansas Order, be refunded by defendant to plaintiff if and when that Order should be adjudged invalid. The subsequent acceptance by defendant of the monthly payments tendered by voucher check, containing a notation that payment was made subject to the terms of the January 21 letter, constituted an acceptance by defendant of plaintiff's offer to pay upon said condition of refund. Therefore, there is a binding contract between the parties for defendant to make the refund sued for here."

Defendant has pointed to numerous legal and factual differences between this case and the *Landon* and *United* cases. For example, in the *United* case the defendant-producer agreed in further correspondence to make the refunds if the pricing order were set aside and it recognized its obligation to do so by including the letter of January 21st with papers it filed with the FPC. I have considered the differences between the *United* and *Landon* cases and the case before me and recognize that in some respects the cases are distinguishable. I remain of the opinion that a contract to refund exists in the case at bar. I am also of the opinion that such holding is in substantial agreement with the law laid down in the two cited cases.

Other contentions raised by defendant are resolved so as not to be inconsistent with the decison here reached.

Summary judgment will be entered in favor of plaintiff on the merits of the case. If a difference of opinion still

exists between the parties as to a computation of the amount due or as to interest, further proceedings will be scheduled in respect thereto. Counsel for plaintiff is requested to prepare an appropriate order.

ORDER AND FINAL JUDGMENT

AND NOW, to-wit, this 21st day of December, 1965, the plaintiff having on March 12, 1965 filed a Motion for Summary Judgment on Refund Contract, and the matter having been briefed and argued, and the Court having rendered its memorandum decision of December 10, 1965, it is

ORDERED that the plaintiff's Motion for Summary Judgment is granted, and judgment is hereby entered for plaintiff against the defendant for the sum of $1,264,826.89, with simple interest thereon at the rate of six percentum (6%) per annum from January 20, 1958, plus the costs of this action.

AND NOW, to-wit, this 21st day of December,

/s/ Andrew D. Christie
Judge

APPROVED AS TO FORM:

MORRIS, JAMES, HITCHENS & WILLIAMS

By Henry N. Herndon, Jr.
701 Bank of Delaware Building
Wilmington, Delaware
Attorneys for Plaintiff

KILLORAN & VAN BRUNT

By /s/ Courtney H. Cummings, Jr.
801 Bank of Delaware Building
Wilmington, Delaware,
Attorneys for Defendant.

APPENDIX E

(Opinion and Judgment of the Supreme Court of Delaware)

IN THE SUPREME COURT OF THE STATE OF DELAWARE

No. 20, 1966

WESTERN NATURAL GAS COMPANY,,
Defendant Below,
Appellant

vs.

CITIES SERVICE GAS COMPANY,
Plaintiff Below,
Appellee

(October 12, 1966)

WOLCOTT, CHIEF JUSTICE, and CAREY and HERRMANN, JUSTICES, sitting.

Clair John Killoran and Courtney H. Cummings, Jr., of Killoran & Van Brunt, Wilmington, (Liddell, Austin, Dawson & Sapp, Houston, Texas, of counsel) for appellant.

John J. Morris, Jr., Howard L. Williams, and Henry N. Herndon, Jr., of Morris, James, Hitchens & Williams, Wilmington (Charles V. Wheeler, Oklahoma City, Oklahoma, of counsel) for appellee.

CAREY, J.:

The sole issue presented in this appeal from the Superior Court is whether the undisputed evidence in the record justifies the holding that a contract existed between the parties whereby Western Natural Gas Company (Western) is obligated to repay Cities Service Gas Company (Cities) the amount of certain overpayments for natural gas.

Prior to the present appeal, the case was before us upon a different issue, i.e., whether Cities was entitled to recover

the overpayments upon a theory of restitution because they were made under duress or business compulsion. See ..... Storey ....., 201 A. 2d 164. The majority of the Court then held that the record was insufficient to justify summary judgment upon that ground. Although the present contract theory was argued, we declined to pass upon it because the question had not been decided by the Court below and was not raised here until reargument. Following an unsuccessful attempt by Western to have the matter reviewed by the United States Supreme Court, 379 U.S. 905, 85 S. Ct. 189, additional affidavits were filed in Superior Court, after which Cities renewed its motion for summary judgment on the contract theory. That Court ruled in Cities' favor.

Because many of the facts have been set forth in our previous opinion, supra, we will state only those presently pertinent. The parties, prior to January 1st, 1954, were bound by a contract whereby Western supplied natural gas to Cities from the Hugoton Field at a price of 8¢ per thousand cubic feet. That contract was subject to all "valid orders, rules and regulations of any regulatory body having jurisdiction". Effective as of that date, the Corporation Commission of Kansas promulgated an order setting a minimum price of 11¢ per M.C.F. for gas produced from the Hugoton Field. Cities immediately filed suit challenging the validity of that order and was ultimately successful in having it declared invalid. Cities Service Gas Company v. State Corporation Commission, 355 U.S. 391, 78 S. Ct. 381.

On January 21st, 1954, before making any payments at the 11¢ rate, Cities wrote the following letter to Western:

> "The State Corporation Commission of the State of Kansas by Order dated December 2, 1953, in Docket No. 44099-C (C-3216) directed that on and after January 1, 1954, as a condition precedent for withdrawal of gas

from the Hugoton Gas Field in Kansas, there shall be paid therefor or attributed thereto, at the wellhead, a minimum price of not less than eleven cents (11¢) per M.c.f. (14.65 pounds p.s.i.a.).

"Cities Service Gas Company and certain other parties filed Petitions in the District Court of Finney County, Kansas, for a judicial review of the said Order.

"Pending final judicial determination of the said Order and beginning January 1, 1954, Cities Service Gas Company intends to pay for all gas purchased by it in the Kansas Hugoton Field in strict compliance with the terms and conditions of the said Order. Such compliance with said Order by this Company, however, is made to avoid the penalties provided by the Kansas statutes for a violation thereof, and the payments made to you in compliance with said Order pending its final judicial determination are to be considered and accepted by you as involuntary payments on our part, without prejudice to our rights in said litigation, and in no event as an acquiescence by us in the validity of said Order.

"In the event the said Order is finally judicially modified or declared to be invalid in whole or in part, as a result of which you have been overpaid for gas purchased during the interim aforesaid, Cities Service Gas Company will expect you to refund to it the amount of said overpayments."

Thereafter, payments by Cities were made at the rate of 11¢ by monthly checks which were received and cashed by Western without comment. To each check was attached a voucher which contained a statement that the payment was made subject to the provisions of the letter of January 21, 1954.

After the decision in Cities Service Gas Company v. State Corporation Commission, supra, was handed down in January 1958, Cities resumed making payments at the 8¢ rate,

and demanded the refund of the "excess" which it now seeks to recover in this action.

Cities presently relies upon the theory that the letter of January 21st, 1954 constituted an offer which was accepted by the receipt and cashing of the checks, whereby a contract, or a modification of the original contract, was created under which Western agreed to repay the excess if and when the Kansas Order was found invalid. The Court below accepted that theory.

Western denies that any refund contract was created. It argues that the letter of January 21, 1954 was nothing more than a statement by Cities of its intent to pay the 11¢ rate; that its language was inadequate to put Western on notice of any intent to make an offer or to call upon Western to agree or disagree; that the language on the check vouchers was insufficient to bind Western in any way; and that prior and subsequent conduct of the parties demonstrates the lack of an intent by either party to create a refund contract.

Cities cites two cases which it contends involved the same factual situation; Western contends that they are basically different and in fact lend no aid to Cities. Those cases are Cities Service Gas Company v. United Producing Company, 212 F. Supp. 116, and Northern Natural Gas Company v. Landon, 212 F. Supp. 856, affd. 338 F. 2d 17, cert. den. 381 U. S. 914, 85 S. Ct. 1529. Both of them were suits for refunds of alleged overpayments made because of the same price order of the Kansas Corporation Commission. We pause to examine them.

In the United case, Cities wrote to United exactly the same letter on the same date as the one written to Western. Shortly thereafter United suggested a modification which was refused by Cities, whereupon United accepted the

terms originally proposed with a minor change* which Cities apparently did not accept. Cities then proceeded to make payments by voucher checks precisely like those sent to Western, the vouchers referring to Cities original letter of January 21, 1954. The Court made this finding:

> "Plaintiff's letter dated January 21, 1954, plaintiff's Exhibit 4, constituted a tender of the minimum price of 11¢ per Mcf upon condition that the difference between the contract price, 7¢ per Mcf, 16.4# psia, and the price paid in compliance with the invalid Kansas Order, be refunded by defendant to plaintiff if and when that Order should be adjudged invalid. The subsequent acceptance by defendant of the monthly payments tendered by voucher check, containing a notation that payment was made subject to the terms of the January 21 letter, constituted an acceptance by defendant of plaintiff's offer to pay upon said condition of refund. Therefore, there is a binding contract between the parties for defendant to make the refund sued for here."

Western contends that the United decision is not persuasive here because United in fact treated Cities' letter as an offer which it accepted, whereas Western did not consider it to be an offer and did not accept it. It will be noted, however, that the Court's finding made no mention of United's letters but expressly based its conclusion of acceptance upon the original letter and the acceptance of the voucher checks. We cannot surmise that this was an oversight on the Court's part; the finding may be explainable by the fact that United's last letter contained a variation (although minor) from the terms stated originally by Cities. Through

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* The suggested change was this: "In the event, however, any of your other suppliers of gas in the Kansas Hugoton Field are granted any limitation or qualification with respect to their obligation to make such refund, United Producing Company, Inc. will expect its obligation with respect thereto to be relaxed to the same extent".

the vouchers, Cities indicated reliance upon its original proposition. As we analyze the opinion and that part of the record which is before us, the facts in the Western case are substantially the same as the present one with respect to the creation of the refund contract.

In the Landon case, the situation was not precisely the same. Northern wrote to Landon on February 23, 1954 that it would pay the 11¢ rate "upon the condition that you will refund . . . the entire amount of the increase" if the Kansas Order should be determined invalid. Its payments after the first letter were by checks which bore an endorsement that they were "accepted subject to conditions of the 2/23/54 letter". Landon accepted those checks without question. The trial Court found the existence of a contract to refund.

Western now suggests that Landon made no real issue about the existence of a refund contract, but claimed that it was actually an agreement to refund only the excess over a prior Kansas rate order of 8¢ rather than the lower rates of the original contract. This suggestion is not in harmony with the opinion of either the trial or appellate Court in the Landon case. The District Court did not mention the 8¢ rate; the reason for that silence appears in the Appellate Court opinion, wherein it is pointed out that the original answer denied the existence of any refund contract and that the matter of rates was not brought into the case until about a month after the District Court's decision — some two years after the original answer. The lower Court refused to permit the amendment because of its lateness. Clearly, the creation of the refund contract was specifically found and affirmed on appeal. There is a difference, of course, in the language used by Northern in both its letter and the endorsements on its checks from that used by Cities, but we think the real meaning is the same. The mere fact that Northern placed the endorsements on the checks them-

selves rather than on attached vouchers is of no significance; no rights of third-party holders are involved.

To determine the existence or non-existence of a contract, we may consider the circumstances surrounding the transaction and what the parties said and did. McCormick on Evidence § 219. The letter of January, 1954 does not say in so many words that Cities was thereby making an offer to pay the increased price on condition that Western agree to refund the excess if the regulation should be held void. It is difficult, however, to believe that it could reasonably be understood to mean anything else. Neither party then knew whether the Kansas order was binding. Neither party knew how long a period would be required to obtain a final ruling and thus find out which price was controlling. If the regulation was valid, the only lawful price was 11¢; if it was not valid, the contract price remained at 8¢. Cities expressed its belief that the regulation was invalid, but apparently Western thought otherwise. Both parties must have realized that many thousands of dollars would be involved; the ultimate excess allegedly totaled over one and a quarter millions excluding interest, or almost $30,000 per month. It is not realistic to think that Cities intended its letter to mean that it was voluntarily going to pay the increased price, notwithstanding its expressed belief in its invalidity and notwithstanding its suit to have it declared so, with nothing more than the hope that Western would repay it if Cities prevailed in its suit. Cities said, in effect, that it was afraid of criminal sanctions (a fear which later proved groundless), that the payments were involuntary and that it would "expect" reimbursement from Western if the contingency happened. The word "expect" is frequently used to mean more than "hope" or "anticipation"; one acceptable definition found in Webster's Third New International Dictionary is to "consider (a person) obli-

gated or in duty bound, as in the expression 'England expects every man to do his duty' ". A definition of the word given in Funk & Wagnalls Dictionary is "to count upon as right and due; rely upon; require". This meaning has been accepted in a number of cases, depending upon the context and the surrounding circumstances. Sillman v. Spokane Savings & Loan Soc., 175 P. 296; Orr v. State, 111 Southern 2d. 627; Wattjis v. Faeth, 40 N. E. 2d. 521, Holcomb v. Holcomb, 159 So. 564; Osborne v. McWilliams Dredging Co., 176 So. 410.

In the light of the circumstances and the position in which the parties found themselves at the time, we think the only reasonable interpretation of Cities' letter is that it was an offer to pay the increase upon the condition of a refund if the regulation should be found invalid. Acceptance of the payments without protest or objection was an acceptance of the offer.

After this case was remanded to the Superior Court, considerable additional material was brought into the record through affidavits. Western contends that the Court erred in granting summary judgment on the ground that these affidavits demonstrated the existence of disputed material facts. It suggests that a jury could find from the evidence a lack of any intent on Western's part to enter into any contract to refund. We have examined the affidavits and find nothing therein to prevent summary judgment. Western's subjective intent is not controlling. 1 Williston on Contracts (3d. ed.) Ch. 2 & 3; 9 Wigmore on Evidence (3d. ed.) § 2413; Restatement of Contracts § 71; 17 C. J. S. 640.

In Eustis Mining Co. v. Beer, Sondheimer & Co., 239 F. 976, Judge Learned Hand had this to say:

"All the attendant facts constituting the setting of

a contract are admissible, so long as they are helpful; the extent of their assistance depends upon the different meanings which the language itself will let in. Hence we may say, truly perhaps, that, if the language is not ambiguous, no evidence is admissible, meaning no more than that it could not control the sense, if we did let it in; indeed, it might 'contradict' the contract — that is, the actual words should be remembered to have a higher probative value, when explicit, than can safely be drawn by inference from surroundings. Yet as all language will bear some different meanings, some evidence is always admissible; the line of exclusion depends on how far the words will stretch, and how alien is the intent they are asked to include".

Similar views are expressed in 9 Wigmore on Evidence (3d. ed.) § 2466. Having found what we consider to be the only reasonable meaning of Cities' letter, any other evidence of attendant facts and circumstances becomes unnecessary and therefore inadmissible.

Finally, Western suggests that there was no consideration for a contract and that it lacks mutuality. We cannot agree. Cities for the time being gave up its right to litigate the rate question as against Western and agreed to make the higher payments pending the outcome of its litigation. That detriment not only furnished sufficient consideration for Western's promise to refund, see Autographic Register v. Phillip Hano Co., 198 F. 2d. 208; it also provided the necessary mutuality. 70 C.J.S. 349.

The judgment below must be affirmed.

Mandate

THE SUPREME COURT OF THE STATE OF DELAWARE

To the Honorable the Judges of The Superior Court of the state of Delaware in and for New Castle County:

GREETING:

WHEREAS, before you or some of you in a cause entitled as follows:

CITIES SERVICE GAS COMPANY

v.

WESTERN NATURAL GAS COMPANY

No. 674 C.A. 1958

a certain judgment or order was entered on the 21st day of December, 1965, to which reference is hereby made; and

WHEREAS, by appropriate proceedings the said cause was duly appealed to this Court, and after hearing has been finally determined, as appears from the opinion of this Court filed in the cause on October 13, 1966, a certified copy of which is attached hereto;

ON CONSIDERATION WHEREOF IT IS ORDERED AND ADJUDGED that the said judgment or order be and it is hereby affirmed.

WITNESS the Honorable Daniel F. Wolcott, our Chief Justice, at Dover, the first day of January, A.D. 1966.

/s/ T. E. TOWNSEND, JR.
Clerk of the Supreme Court.

Issued November 1, 1966

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FEB 27 1967
JOHN F. DAVIS, CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 1009

WESTERN NATURAL GAS COMPANY,
Petitioner,

VERSUS

CITIES SERVICE GAS COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Delaware

BRIEF FOR RESPONDENT CITIES SERVICE GAS COMPANY IN OPPOSITION

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February 27, 1967

UTTERBACK TYPESETTING CO., 18 SO. WALKER, OKLAHOMA CITY, PH. CE 8-0080

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In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1009

WESTERN NATURAL GAS COMPANY,
Petitioner,

VERSUS

CITIES SERVICE GAS COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Delaware

BRIEF FOR RESPONDENT CITIES SERVICE GAS COMPANY IN OPPOSITION

OPINIONS BELOW

The original opinion of the Superior Court of the State of Delaware in and for New Castle County (Pet. App. B, pp. 5a-12a) is unreported. The first opinion of the Supreme Court of Delaware (Pet. App. C, pp. 14a-25a) is reported at 201 A.2d 164. The opinion, on remand, of the Delaware Superior Court (Pet., App. D, pp. 28a-35a) is unreported. The second opinion of the Supreme Court of Delaware (Pet. App. E, pp. 36a-44a) is reported at 223 A.2d 379.

JURISDICTION

The opinion of the Supreme Court of Delaware was entered on October 12, 1966. A petition for rehearing was denied and mandate issued on November 1, 1966. The petition for certiorari was filed on January 27, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act are set forth in Appendix A to the Petition, pp. 1a-4a.

QUESTION PRESENTED

Whether in the circumstance of this case the primary jurisdiction, exhaustion of administrative remedy and filed rate doctrines operate to oust the Delaware courts of jurisdiction to pass upon the claims of Cities Service Gas Company for refunds of the excess over the contract price paid to Western Natural Gas Company because of a void Kansas Minimum Price Order.

STATEMENT OF THE CASE

This suit is the last of four identical actions brought by Cities Service Gas Company (Cities) in the Superior Court of New Castle County, Delaware, to recover overpayments made to four producers of natural gas in the Kansas-Hugoton Field under the mandate of the Kansas Minimum Price Order which was held invalid by this Court in *Cities Service Gas Co.* v. *State Corporation Commission*, 355 U.S. 391 (1958).

Three of the four producers sought and obtained a writ of certiorari to review the jurisdiction of the Delaware

courts (363 U.S. 818). This Court affirmed the Delware Court's jurisdiction. *Pan American Petroleum Corp.* v. *Superior Court*, 366 U.S. 656 (1961). The facts in this case are substantially identical with the facts stated in that opinion.[1]

Cities is a natural gas pipeline company. Petitioner, Western Natural Gas Company (Western), is a producer of natural gas. In 1949 Cities contracted with Western to purchase natural gas produced in the Hugoton Field in Kansas at a contract price of 8 cents per Mcf (A4, A10).[2] On December 2, 1953, the Kansas Corporation Commission issued an order fixing a minimum price of 11 cents per Mcf to be paid for all gas taken from the Kansas-Hugoton Field. The effect of this Order was to require Cities to pay Western 11 cents rather than the lower price fixed in the contract (A4-5, A10).

Prior to making its first payment at the higher rate, Cities advised Western by letter dated January 21, 1954, that it was prosecuting a suit for judicial review of the Order but it would comply with the Order's provisions while the suit was pending. The letter further advised that the payments to be tendered under the Order were to be made and accepted as involuntary payments, and concluded by stating that if the Order was determined to be invalid, Cities would expect Western to refund the over-

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[1] The litigation with producers other than Western has now been terminated, and the monies received by Cities have been passed on to Cities' customers who paid an increased price on account of the void Kansas Order.

[2] Citations to the record will follow the pattern adopted by Western. See Pet., p. 2, fn. 1.

payments (A5-6, A11). Thereafter, until January 20, 1958, each monthly payment by Cities to Western was made by a voucher check which bore a caveat that the payments were tendered "subject to provisions" of the January 21, 1954, letter. Western received, cashed and retained the proceeds of each voucher check without objection (A6-7, A11).

Following this Court's holding, on January 20, 1958, that the Kansas Minimum Price Order was invalid *(Cities Service Gas Co.* v. *State Corporation Commission, supra),* Cities commenced this action in the Superior Court of Delaware to recover the overpayments made to Western. As in the complaints described in this Court's opinion in *Pan American, supra,* Cities, in its complaint here, alleged the gas purchase contract specifying the 8-cent price; the entry of the Kansas Minimum Price Order; Cities' letter of January 21, 1954; Cities' monthly voucher checks with the "subject to provisions" noted thereon; and this Court's determination that the Kansas Order was invalid (A4-7). Based upon these allegations, Cities sued for the overcharges paid to Western on alternative theories that there was a contract to refund the overpayments and that Cities was entitled to restitution of the overpayments by which Western had been unjustly enriched under the compulsion of the invalid Kansas Order (A7-9).

Western denied that there was a contract to refund, invoked equitable defenses to the restitution theory, and defended upon its status as an independent producer of natural gas under the Natural Gas Act and upon the regulation of its rates by the Federal Power Commission (A10-15). Western contended that the trial court was without jurisdiction over the suit because the determination as to

what constituted its filed rate and whether or not it had been overpaid for gas delivered to Cities were matters within the exclusive jurisdiction of the Federal Power Commission under the Natural Gas Act (A12).[3] Western also defended on the ground that since it had filed the void Order along with the sale contract as its rate schedule, its rate was 11 cents and the Natural Gas Act prohibited deviation from that rate (A10-14).

The Superior Court of Delaware overruled Western's Motion for Summary Judgment based on its defenses grounded on the Natural Gas Act, granted Cities' Motion for Summary Judgment on the theory of restitution and entered judgment for Cities in the amount sued for with interest thereon at 6 per cent per annum (Pet., App. B). Upon Western's appeal, the Delaware Supreme Court similarly rejected Western's Natural Gas Act defenses and affirmed the trial court's jurisdiction over the issues in this suit (Pet., App. C).[4] The Delaware Supreme Court held that the uniform decisions of the United States Courts of Appeals[5] supported and required the determination that

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[3] This question was presented to this Court in *Pan American Petroleum Corp.* v. *Superior Court, supra,* in which it was held that State Courts have jurisdiction over suits such as this based on common law rights even though the defense is based upon the Natural Gas Act.

[4] Citing *Pan American, supra.*

[5] *Pan American Petroleum Corp.* v. *Kansas-Nebraska Natural Gas Co., Inc.,* 297 F.2d 561 (8th Cir. 1962), *cert. denied,* 370 U.S. 937 (1962); *Natural Gas Pipeline Co. of America* v. *Federal Power Commission,* 253 F.2d 3 (3d Cir. 1958), *cert. denied sub nom, Dorchester Corp.* v. *Natural Gas Pipeline Co. of America,* 357 U.S. 927 (1958); *Cities Service Gas Co.* v. *Federal Power Commission,* 255 F.2d 860 (10th Cir. 1958), *cert. denied sub nom, Magnolia Petroleum Co.* v. *Cities Service Gas Co.,* 358 U.S. 837 (1958).

Western's filed rate under the Natural Gas Act was the 8-cent contract rate, unaffected by the void Kansas Minimum Price Order (Pet., App. C, p. 17a).

Although the court went on to recognize that Western had received payments in excess of its filed rate, it held that the showing of duress was insufficient to justify recovery on the theory of unjust enrichment. The Delaware Supreme Court therefore ordered the case remanded for further proceedings (Pet., App. C).

Following this Court's denial of Western's petition for certiorari (No. 408, Oct. T. 1964, 379 U.S. 905 (1964)) the Superior Court, on remand, again granted Cities' Motion for Summary Judgment. Limiting its consideration to Cities' substantive right to recover, the Court this time found a contract to refund based on the January 21, 1954, letter and the receipt, cashing and retention by Western of the proceeds of the checks (Pet., App. D). On appeal, the Delaware Supreme Court reviewed the substantive issues in this case and affirmed the Superior Court's judgment (Pet., App. E).

ARGUMENT

Western does not question the substantive conclusion of the Delaware Supreme Court that Cities had a contractual right to recover the payments made above its contract price. It seeks instead to reach back to the earlier decision of that court and to question the jurisdiction of the Delaware courts to pass on these matters. The questions which Western seeks to raise are virtually identical to those raised in Western's earlier petition for certiorari (See Pe-

tition in No. 408, Oct. T. 1964), which this Court denied, 379 U.S. 905 (1964).[6] As shown below, the decision of the Delaware court is in accord with established precedents and there is no conflict of decisions. Accordingly, there is no warrant for review by this Court.

I

The Decision of the Delaware Court Does Not Infringe Upon the Primary Jurisdiction of the Federal Power Commission

Western seeks to invoke the primary jurisdiction and exhaustion of administrative remedy doctrines because it asserts, "[r]egulated companies cannot follow the dictates of two authorities as to past, present or future rates. * * *" (Pet., p. 10). Further, according to Western, those doctrines are "peculiarly applicable where, as here, a court and an administrative body may otherwise render conflicting decisions within the administrative body's jurisdiction * * *." (Pet., p. 4, fn. 9.) However, a virtually identical argument was made by the petitioners and rejected by this Court in *Pan American Petroleum Corp.* v. *Superior Court, supra.*

As this Court noted in *Pan American,* the petitioners were contending "that to permit the state courts to entertain the suits brought by Cities Service will jeopardize the uniform system of regulation that Congress established

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[6] While Western points out (Pet., p. 2), Cities had urged that the earlier decision of the Delaware Supreme Court was not final, Western had strenuously argued that that decision of the Delaware Court was final (see Pet. in No. 408, Oct. T. 1964 at pp. 10-11).

through the Natural Gas Act" (See 366 U.S. at 665).[7] In rejecting that argument, this Court ruled (*Id.*, at 665-66):

> "* * * Apart from other considerations that dispel such fears, it should be remembered that the route to review by this Court is open to parties aggrieved by adverse state-court decisions of federal questions. In *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285, the question before the Court was whether not merely the state courts but any court had jurisdiction to construe a tariff prior to consideration of the disputed question of construction by the Interstate Commerce Commission. It was argued in that case, as it is argued here, that to permit entry into the courts, without initial resort to the Commission, would destroy essential uniformity. The answer there given by Mr. Justice Brandeis, speaking for the Court, applies here:
>
> 'This argument is unsound. It is true that uniformity is the paramount purpose of the Commerce Act. But it is not true that uniformity in construction of a tariff can be attained only through a preliminary resort to the Commission to settle the construction in dispute. Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff it is one of federal law. If the parties properly preserve their rights, a construction given by any court, whether it be federal or state, may ultimately be reviewed by this Court either on writ of error or on writ of certiorari; and thereby uniformity in construction may be secured. Hence, the attainment of uniformity does not require that in every case where the construction of a tariff is in dispute, there shall be a preliminary resort to the Commission.' 259 U.S., at 290-291."

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[7] See, also, Brief for Petitioner in No. 80, Oct. T. 1960, at pp. 51, *et seq.*

See, also, *e.g.*, *Pan American Petroleum Corp.* v. *Kansas-Nebraska Natural Gas Co., Inc.*, 297 F.2d 561 (8th Cir. 1962), *cert. denied*, 370 U.S. 937 (1962); *Landon* v. *Northern Natural Gas Co.*, 338 F.2d 17 (10th Cir. 1964), *cert. denied*, 381 U.S. 914 (1965)[8] which also involved the recovery of overpayments made pursuant to the void Kansas Minimum Price Order. The primary jurisdiction doctrine is equally inapplicable in this case and does not invalidate the judgment of the Delaware court.

Also, contrary to Western's argument, the decision of the Delaware court is neither in conflict with this Court's decision in *Carnation Company* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966), nor is it in conflict with the decisions of the Fifth Circuit in *J. M. Huber Corp.* v. *Denman*, 367 F.2d 104 (1966), and *Weymouth* v. *Colorado Interstate Gas Co.*, 367 F.2d 84 (1966).

Carnation's holding that in light of the Shipping Act's provision exempting activities lawful under Section 15 thereof from the antitrust laws, court proceedings founded upon an alleged violation of the antitrust laws should be stayed until the Maritime Commission had determined the applicability of the exemption is not violated by the facts in this case.

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[8] Western's attempted distinction of these cases (Pet., p. 12, fn. 10) is irrelevant since, whatever questions were raised in the petitions in these cases, the opinions of the Courts of Appeals clearly dealt with the issue of jurisdiction. In all probability, no primary jurisdiction questions were raised in the Petitions for Certiorari in these cases because of the petitioners' recognition that the issue had already been resolved in this Court's *Pan American* decision.

In *Huber* and *Weymouth*, the Fifth Circuit not only acknowledged that its action involved a "new application of the doctrine of primary jurisdiction" (367 F.2d at 111), but its ruling, that action should be postponed to give the Federal Power Commission an opportunity to determine initially whether it had jurisdiction in the premises, adopted the suggestion of the Commission itself *(Ibid.)*.

The situation here is entirely different. The Federal Power Commission, on at least two separate occasions, had expressly undertaken to leave the resolution of this controversy to the courts as a more appropriate forum. The first of these occasions was in connection with the Commission's denial of Western's motion to consolidate its complaint that Cities had failed to pay at the rate alleged by Western to be the lawful filed rate with another proceeding involving Cities' rates (See Pet., pp. 7-8).[9] The Commission there expressly noted the pendency of the instant litigation and held:

> "Since litigation is now pending between the parties concerning the lawful rate for the sale and purchase of gas, it is neither necessary, appropriate, nor in the public interest for the Commission, at this time, to undertake to determine the rates for these sales * * *." (*Id.* at mimeo, p. 2).

In view of this determination, the reasons why the Commission has taken no further action in this proceeding are

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[9] Order Denying Petition for Leave to Intervene and Denying Motion to Consolidate Proceedings, Docket Nos. G-18799, G-14958, issued February 9, 1961, quoted and relied upon by the Delaware Supreme Court (Pet., App. C, p. 18a).

obvious even though, as Western points out (Pet., p. 8), the docket has not been technically closed.

The second occasion was in connection with the termination of a rulemaking proceeding instituted for the purpose of dealing with the effects of the void Kansas Minimum Price Order upon filed rates and upon future rate filings. Referring to this Court's decision in the *Pan American* case, *supra*, the Commission originally stated:[10]

> "We recognize, moreover, that a buyer of natural gas who has paid seller on the basis of a state minimum price law had an adequate remedy in an appropriate court in the event that his contract entitles him to a refund as a result of the invalidity of the state minimum price laws."[11]

Still adverting to this Court's *Pan American* decision, the Commission subsequently revised the statement above to read (27 F.P.C. at 528 (1962)):

> "We recognize, moreover, that a buyer of natural gas who has paid seller on the basis of a state minimum price law can invoke the jurisdiction of an appropriate court in the event that his contract provides for a refund if the state minimum price laws are held invalid."

And, by way of explanation, the Commission commented *(Ibid.)*:

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[10] *Nonacceptability of Rate Filings Based on State-Prescribed Minimum Prices*, Docket No. R-168, 27 F.P.C. 326, 327 (1962).

[11] The statement quoted in the text appears in the Commission order immediately following the statement reproduced by Western (Pet., p. 14). Obviously, when the two statements are read together, they do not have the thrust urged by Western.

"* * * [t]hat sentence was not intended to express or imply any view as to whether contract actions in appropriate state or federal courts might be subject to defenses other than defenses based on the Kansas minimum-rate order itself. To avoid doubt on that score, we hereby amend the above-quoted sentence * * *."

Because of these prior Commission actions, there is plainly no conflict between the Delaware court's decision and the decisions of the Fifth Circuit. There is no confusion as to whether this case and the merits of its controversy are subject to the jurisdiction of the Commission or of the courts. The Commission has deferred to the courts.

II

The Delaware Court's Decision Does Not Conflict With the Filed Rate Doctrine

Western's further argument that the Delaware court's decision violates the so-called "filed rate" doctrine erroneously assumes that the 11-cent price fixed in the void Kansas Minimum Price Order has become Western's legal rate on file with the Commission. The fact is that there has been no Commission action which had any such effect.[12]

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[12] When Western filed its initial rate schedule for the sale of gas to Cities (A100) and its application for a certificate of public convenience and necessity authorizing the continuation of the sale at a rate which was in part determined by the Kansas Minimum Price Order, the Commission's acknowledgment expressly advised that the:

"* * * acceptance for filing shall not be construed as a waiver of the requirements of Section 7 of the Natural Gas Act, as amended; nor shall it be construed as *constituting approval of any rate, charge, classification,* * * *." (Emphasis supplied.) (Letter from Federal Power Commission to Western Natural Gas Co., dated March 8, 1955.) (A. 90.)

Moreover, the Kansas Supreme Court has recognized that the Minimum Price Order was void *ab initio*. *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, 184 Kan. 540 (1959), *cert. denied*, 361 U.S. 836 (1959). In the many similar actions brought by pipeline companies to recover overpayments during the several years since this Court's invalidation of the Kansas Order (*Cities Service Gas Co.* v. *State Corporation Commission*, 355 U.S. 391 (1958)), the courts, both state and federal, have uniformly recognized that the filing of the Kansas Order with the Commission as part of a rate schedule did not have the effect of increasing the filed rate above the level provided in the sales contract between the parties. *Pan American Petroleum Corp.* v. *Kansas-Nebraska Natural Gas Co., Inc.*, 297 F.2d 561 (8th Cir. 1962), *cert. denied*, 370 U.S. 937 (1962); *Natural Gas Pipeline Co. of America* v. *Federal Power Commission*, 253 F.2d 3, 7 (3d Cir. 1958), *cert. denied sub nom, Dorchester Corp.* v. *Natural Gas Pipeline Co. of America*, 357 U.S. 927 (1958); *Natural Gas Pipeline Co. of America* v. *Harrington*, 246 F.2d 915 (5th Cir. 1957),

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[12] (Continued)

Similarly, when it dismissed the investigation into Western's rates instituted under Section 5(a) of the Natural Gas Act (see Pet., pp. 6-7), the Commission stated:

> "We * * * do not reach the questions whether Western's individual rates are just and reasonable because we believe that decision on this question is not administratively justifiable or necessary under the particular circumstances of this case. Thus the dismissal is not a determination that * * * the present existing rates should be continued in effect * * *; * * *. [T]his order * * * *shall not be construed as a determination as to what the effective legal rates are or have been for jurisdictional sales by Western.*" (Emphasis supplied.) (*Western Natural Gas Co.*, 23 F.P.C. 235, 237 [1960]).

cert. denied, 356 U.S. 957 (1958); *Cities Service Gas Co.* v. *Federal Power Commission*, 255 F.2d 860, 865 (10th Cir. 1958), *cert. denied sub nom, Magnolia Petroleum Co.* v. *Cities Service Gas Co.*, 358 U.S. 837 (1958); *Saturn Oil and Gas Co.* v. *Northern Natural Gas Co.*, 359 F.2d 297, 301 (8th Cir. 1966); *Cities Service Gas Co.* v. *United Producing Co.*, 212 F.Supp. 116 (N.D. Okla. 1960); *Northern Natural Gas Co.* v. *Landon*, 212 F.Supp. 856 (D. Kan. 1961), *aff'd* 338 F.2d 17 (10th Cir. 1964), *cert. denied*, 381 U.S. 914 (1965); *Helmerich & Payne* v. *Colorado Interstate Gas Co.*, 187 A.2d 67 (Del. 1962); *Columbian Fuel Corp.* v. *Superior Court*, 158 A.2d 478 (Del. 1960); *Cities Service Gas Co.* v. *Columbian Fuel Corp.*, 155 A.2d 879 (Del. Super. Ct. 1959).

The universally applied rule was summarized by the Court of Appeals for the Eighth Circuit in *Saturn, supra* (359 F.2d at 301):

> "As heretofore pointed out, courts have consistently held that rates imposed by an invalid order, such as the Kansas order, are void ab initio and a complete nullity. A void rate order cannot modify or alter a valid contract rate. Hence, as we stated in *Pan American* [*Pan American Petroleum Corp.* v. *Kansas-Nebraska Natural Gas Co.*, 297 F.2d 561 (8th Cir. 1962)] the result of the determination of the invalidity of the Kansas order was to leave the parties where they were prior to the unlawful order. In other words, the Kansas order could have no bearing upon the effective rate and the effective rate was the rate the parties bargained for in their original contract * * *.
>
> * * * * * *
>
> "It is our view that our *Pan American* case and the authorities there cited and relied upon define the meaning of effective rate under the circumstances

here presented and make it clear that the Kansas rate order is part of the effective rate only upon the contingency that its validity is upheld. The final determination that the Kansas order is void ab initio deprives such order from having any bearing upon the effective gas rate. After such adjudication, the effective rate is the rate fixed by the original contract."

Since, under the cases listed above, the contract rate remained the effective filed rate, the filed rate doctrine does not bar the holding of the Delaware court that Cities was entitled to a refund of the excess over the contract rate paid pursuant to the void Kansas Order.

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1009

WESTERN NATURAL GAS COMPANY, *Petitioner,*

v.

CITIES SERVICE GAS COMPANY, *Respondent.*

On Petition for Writ of Certiorari to the Supreme Court of the State of Delaware

REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

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On Petition for Writ of Certiorari to the Supreme Court of the State of Delaware

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REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

Petitioner Western Natural Gas Company replies to Respondent's Brief in Opposition to set forth recent developments bearing upon the issue of primary juris-

diction and to correct specific error in Respondent's argument:

1. In citing urgent necessity for this Court's clarification of Federal Power Commission primary jurisdiction, Petitioner referred in its Petition to the *Hennigh* case, a class action against Petitioner in a Kansas state court (Pet. p. 12 n. 11; pp. 19, 20). Plaintiffs in that case have now moved for summary judgment against Petitioner. Their contention is that despite past or future acts of the Commission, the Delaware courts or this Court, the Kansas court should now hold that Petitioner's payments to royalty owners must be on the basis of 11 cents and 15 cents per Mcf for periods involved here instead of the 8 cents purportedly established in the Delaware courts' opinions.

In an attempt to avoid two state court judgments which may conflict with each other and with Commission actions, Petitioner, on February 23, 1967, filed a further complaint before the Commission (FPC Docket No. RI67-310). Petitioner there cited the plaintiffs in the Kansas case as defendants, urged the Commission to exercise its primary jurisdiction over the controversy in the Kansas courts, and informed the Commission of the connection between that controversy and Petitioner's complaint against Respondent still pending in Commission Docket No. G-14,958, which, as pointed out in the Petition here, has never been acted on (Pet. pp. 8, 14, 16).

Petitioner thus now faces imminence of conflicting state court and agency decisions as to liabilities flowing from the same set of facts and agency actions, a situation in which any past "deferral" of exercise of agency

jurisdiction cannot continue.[1] Assumption of Commission primary jurisdiction has become imperative to resolve these controversies in a single forum, with finality as to all parties and agencies involved.

2. Respondent concedes here that Petitioner preserved the question of Commission primary jurisdiction throughout the proceedings in the Delaware courts (Resp. Br. pp. 4-5); that the opinions below are final (Resp. Br. p. 6); that Petitioner's Complaint raising the same issues is still pending before the Commission (Resp. Br. pp. 10-11); and that the issue of primary jurisdiction was *not* brought here by petitions following *Pan American Petroleum Corp.* v. *Kansas-Nebraska Natural Gas Co.*, 297 F. 2d 561 (8th Cir.), cert. denied, 370 U.S. 937 (1962), and *Landon* v. *Northern Natural Gas Co.*, 338 F. 2d 17 (10th Cir. 1964), cert. denied, 381 U.S. 914 (1965).[2]

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[1] The situation has changed markedly since the 1958-1961 period discussed in Respondent's Brief. Cities then urged the Commission to defer acting on Western's complaint in Docket No. G-14,958 because a number of collateral issues involving the Kansas minimum price order, not within Commission primary jurisdiction, were still unresolved in pending court cases, *e.g.*, whether the state order was void *ab initio* or only after the date of federal pre-emption; whether invalidation was limited only to volumes resold subject to Commission jurisdiction; whether a refund contract existed; and whether recovery was precluded under doctrines of limitations of actions, voluntary payment, estoppel, etc.

Today, however, these issues all have been decided. The Commission thus may now proceed upon remaining questions of effective rates under the Natural Gas Act and the legal effect of Commission actions, all of which fall within the Commission's primary jurisdiction as the doctrine is spelled out in *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59 (1956), and *Far East Conference* v. *United States*, 342 U.S. 570 (1952).

[2] Resp. Br. p. 9 n. 8.

Respondent nevertheless attempts to show that the question of primary jurisdiction was considered in *Pan American Petroleum Corp.* v. *Superior Court of the State of Delaware,* 366 U.S. 656 (1961). In so arguing, Respondent demonstrates the confusion engendered by *Pan American* in both state and lower federal courts.

The issue presented in *Pan American,* as in *Gully* v. *First National Bank,* 299 U.S. 109 (1936), was only whether underlying federal questions *ousted* a state court of jurisdiction at the outset, requiring the plaintiff to initiate its action in a federal District Court. Primary jurisdiction of the Commission was neither raised, briefed, argued, nor discussed in the case. This Court held, as in *Gully,* that because the face of the complaint did not disclose assertion of a federal right or immunity, the state court could entertain the complaint. The Court, however, stressed that it was not passing upon questions that could later be raised as to the effect of the Natural Gas Act upon the asserted right of recovery (366 U.S. at 664), and Cities itself emphasized that such questions were not then before this Court.[3] Clearly, the question of primary agency jurisdiction, emergent before the state court at a later point in the proceedings, was neither considered nor passed upon in *Pan American.*

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[3] In its brief filed with this Court in *Pan American,* Cities stated: "The single question presented to and decided by the Delaware Court was whether or not the trial court had jurisdiction, not to render a particular judgment, but to entertain the cases before it." Brief for Respondent Cities Service Gas Co., filed March 20, 1961, p. 20 (No. 80, O.T. 1960).

Cities' misreading of *Pan American,* and similar misinterpretation by lower courts in the cases Cities cites (Resp. Br. p. 5 n. 5; pp. 13-14), thus emphasize the necessity for prompt clarification here upon the issue of primary jurisdiction. In the Kansas royalty owners' cases, *Pan American* is cited, as Cities does here, as holding that the Commission has no primary jurisdiction over the pending controversies.

While the Fifth Circuit in the *Huber* and *Weymouth* cases has followed the most recent opinions of this Court as to primary agency jurisdiction, neither the Delaware courts, nor the Kansas courts to date, have done so. Yet, it is in the area of state court-Commission relationship that *Pan American* has been the subject of greatest misinterpretation, leading now to the imminent prospect of not less than two conflicting judgments as to liabilities of Petitioner and other regulated companies.

3. On the issue of the merits of the filed rate doctrine, Cities carefully ignores the legal effect of the Commission actions in this case under Sections 7 and 5(a) of the Natural Gas Act, all of which pre-dated the attempt of state courts to enter judgments against Petitioner, and none of which was involved in cases Cities cites. Cities instead attempts to translate, rationalize or explain away Commission actions under Section 4 in this and other cases, but all of this merely underscores that the Commission—not a state court or a private party such as Cities—should first pass upon all questions of meaning and effect of these agency actions and of their legal impact upon the rights of the private parties.

Moreover, Cities misstates the issue and relevance of cases it cites (Resp. Br. pp. 13-14).[4] The issue here is not whether, as held in such cases, the state order, after invalidation, did not operate to change a "contract rate"; the issue is whether Commission actions under the Natural Gas Act operated to establish an exclusive, federal rate, regardless of the status of a state order or antecedent contract. See *Southwestern Sugar & Molasses Co.* v. *River Terminals Corp.*, 360 U.S. 411 (1959); *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.*, 162 F. 2d 388 (5th Cir.), cert. denied, 332 U.S. 770 (1947). In *Southwestern*, this Court held that an exculpatory clause in a tariff filed with (but not "approved" by) the Interstate Commerce Commission was not automatically ren-

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[4] Cases cited by Cities were either (1) timely petitions properly brought under Section 19(b) of the Natural Gas Act for review of Commission actions upon rates (*Natural Gas Pipeline Co. of America* v. *Federal Power Commission*, 253 F. 2d 3 (3rd Cir. 1958); *Cities Service Gas Co.* v. *Federal Power Commission*, 255 F. 2d 860 (10th Cir.), cert. denied sub nom., *Magnolia Petroleum Co.* v. *Cities Service Gas Co.*, 358 U.S. 837 (1958)); (2) collateral litigation before the same Delaware courts and underlying the opinions here involved (*Helmerich & Payne* v. *Colorado Interstate Gas Co.*, 187 A. 2d 67 (Del. 1962); *Columbian Fuel Corp.* v. *Superior Court*, 158 A. 2d 478 (Del. 1960); *Cities Service Gas Co.* v. *Columbian Fuel Corp.*, 155 A. 2d 879 (Del. Super. Ct., 1959)); or (3) collateral litigation which did not involve Commission actions under Sections 5(a) and 7 of the Act (*Pan American Petroleum Corp.* v. *Kansas-Nebraska Natural Gas Co.*, 297 F. 2d 561 (8th Cir.), cert denied, 370 U.S. 937 (1962); *Saturn Oil & Gas Co.* v. *Northern Natural Gas Co.*, 359 F. 2d 297 (8th Cir. 1966); *Cities Service Gas Co.* v. *United Producing Co.*, 212 F. Supp. 116 (N.D. Okla. 1960); *Northern Natural Gas Co.* v. *Landon*, 212 F. Supp. 856 (D. Kan. 1961), aff'd., 338 F. 2d 17 (10th Cir. 1964), cert. denied, 381 U.S. 94 (1965)).

dered invalid as a part of an effective tariff merely because, as this Court had held in an earlier case, such clauses were against public policy, and therefore void, under private law. The Court directed referral to the agency of the question of validity of the provision as a part of the tariff under federal law. The Court's decision illustrates the fallacy of Cities' argument (Resp. Br. p. 12 n. 12; p. 13) that "acceptance" of a rate for filing by an agency, without "approval," has no legal significance in rate regulatory law. The case also illustrates the conflict between this Court's decisions involving filed rate issues and decisions of lower courts, misinterpreting Federal Power Commission orders, relied upon by Cities. See *Cities Service Gas Co.* v. *Columbian Fuel Corp.*, 155 A. 2d 879 (Del. Super. Ct. 1959); *Pan American Petroleum Corp.* v. *Kansas-Nebraska Natural Gas Co.*, 297 F. 2d 561, 567 (8th Cir.), cert. denied, 370 U.S. 937 (1962); *Landon* v. *Northern Natural Gas Co.*, 338 F. 2d 17, 20 (10th Cir. 1964), cert. denied, 381 U.S. 914 (1965).

Under the filed rate doctrine, Commission actions under Sections 4, 5, and 7 should not be treated as "void" or without legal significance in collateral litigation. This case thus presents the vehicle for a necessary and clear declaration that under the Natural Gas Act, as under the Interstate Commerce and Federal Power Acts, rates made effective and recognized by Commission actions are binding collaterally and remain so until modified through Commission action under Sections 4 and 5 of the Act.

CONCLUSION

For these reasons and those previously set forth, the Petition for Writ of Certiorari should be granted.

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No. 1009

IN THE
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OCTOBER TERM, 1966

WESTERN NATURAL GAS COMPANY, *Petitioner*,

v.

CITIES SERVICE GAS COMPANY, *Respondent*.

On Petition for Writ of Certiorari to the Supreme Court of the State of Delaware

PETITION FOR REHEARING BY PETITIONER

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OCTOBER TERM, 1966

No. 1009

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v.

CITIES SERVICE GAS COMPANY, *Respondent*.

On Petition for Writ of Certiorari to the Supreme Court of the State of Delaware

---

PETITION FOR REHEARING BY PETITIONER

Petitioner prays that this Court grant rehearing of its order of March 13, 1967 denying the petition for writ of certiorari, and that a writ of certiorari issue to review the decision and judgment of the Supreme Court of the State of Delaware in the above-entitled case (No. 20, 1966 below) as prayed for in the petition filed January 24, 1967 herein. As alternatives to issuance of a writ of certiorari, Petitioner prays that this Court either hold this case in abeyance, or remand this case to the Supreme Court of the State of Delaware with directions to stay its judgment, pending resolution by the Federal Power Commission of proceedings now before it, more fully described herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT OR GRANTING ALTERNATIVE RELIEF

1. As set forth in the Petition, the principal issue in the instant case is whether the Federal Power Commission, rather than a state court in a collateral action, has primary jurisdiction over a controversy between Petitioner and Respondent as to an effective rate under the Natural Gas Act, 15 U.S.C. §§ 717-717w. The Supreme Court of the State of Delaware held in such collateral action below that the Commission does not have primary jurisdiction over that rate dispute.

2. In its Reply to Brief for Respondent in Opposition, Petitioner referred to complaint proceedings[1] instituted by it with the Commission on February 23, 1967, in an attempt to avoid the possibility of conflicting judgments of two courts of different states[2] and of the Commission itself regarding the effective rate of the natural gas which is the subject of the instant case.

3. At the time of this Court's Order of March 13, 1967, the Commission had not acted on Petitioner's complaint, nor had Defendants Hennigh, *et al.* responded thereto. On March 29, 1967, said Defendants filed their Response, stating as to the effective rate issue that they "are not bound by" the judgment of the Supreme Court of Delaware issued below; that "although the dispute was over rates for the sale and delivery of gas admittedly within the jurisdiction of

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[1] *Western Natural Gas Company* v. *Hennigh, et al.*, Docket No. RI67-310 (Reply, p. 2).

[2] The Delaware Court below and the District Court, Grant County, Kansas, before which is pending *Hennigh* v. *Western Natural Gas Company*, No. 2523.

the Federal Power Commission," nevertheless "such dispute was not within the primary or exclusive jurisdiction of the Federal Power Commission"; and that the suit instituted in the state court of Kansas "is beyond the jurisdiction of the Federal Power Commission." Subsequently, on April 3, 1967, the Commission issued an Order setting the proceeding for hearing on the question raised in Petitioner's complaint as to Commission jurisdiction over royalty owners. Should the Commission decide that it possesses such jurisdiction, necessarily it then would proceed to a determination of the rates at which gas royalties are payable,[3] including Petitioner's rate purportedly "established" by the Delaware courts below. By its Order of April 3, 1967, the Commission essentially has refused to defer exercising its jurisdiction over the matter in controversy below, and in the Kansas court. The intensified imminence of conflicting court and Commission decisions as to Petitioner's liabilities arising from the same subject matter thus is obvious: the Delaware Court has decided Petitioner must refund all amounts collected in excess of 8 cents per Mcf; the Kansas Court has been requested to rule that Petitioner must pay royalties based upon rates of 11 cents and 15 cents per Mcf; and the Commission may determine still different rates for payment of royalties.

4. Thus, at the time this Court denied certiorari, the Commission had not acted in the premises, and the Respondent was free to argue that the Commission in effect had declined to exercise its jurisdiction, so that state courts could adjudicate the applicable rates.

[3] As specified in *J. M. Huber Corp.* v. *Denman*, 367 F.2d 104, 121 (5th Cir. 1966).

Subsequent to the denial of certiorari, however, the Commission decided to test the extent of its jurisdiction in regard to royalty owners, and if it exercises that jurisdiction to the fullest, its decision necessarily will take into account and in effect determine the very rates that the court below has already set. The Commission, of course, asserts in its order that it will not at this hearing decide the "effective rate" issue raised in Western's complaint before the Commission, but if Commission jurisdiction is held to exist, the effective rate issue is unavoidable. At the very least, this is an issue which should be preserved pending Commission determination of the jurisdictional questions it has now said it will answer.

5. In light of the Commission's Order of April 3, 1967, the issue of primary jurisdiction raised by this case takes on great practical importance in the administration of the Natural Gas Act. This Court must act so as to allow the Commission to proceed to resolve this controversy unhindered by final state court rulings upon the same operative facts. In no way short of granting relief requested herein can the confrontation of such conflict be avoided.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, Petitioner respectfully urges that rehearing be granted and that upon such rehearing, a writ of certiorari issue to the Supreme Court of the State of Delaware.

As alternatives to such relief, Petitioner prays that this Court either hold this case in abeyance, or remand this case to the Supreme Court of the State of Delaware with directions to stay its judgment pending

resolution by the Federal Power Commission of the proceeding in *Western Natural Gas Company* v. *Hennigh, et al.*, FPC Docket No. RI67-310.

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April 7, 1967

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

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